Madras Bar Association Vs Union Of India & Another

Court: Supreme Court Of India

Date of Decision: July 14, 2021

Acts Referred: Constitution Of India, 1950 â€" Article 14, 16, 21, 31(2), 32, 37, 50, 105(2), 123, 131, 136, 141, 142, 194(2), 211, 213, 217, 226, 227, 236, 262, 309, 311, 312, 323A, 323A(2)(d), 323A(1), 323B(3)(d)
Tribunal, Appellate Tribunal And Other Authorities (Qualifications, Experience And Other Conditions Of Service of Members) Rules, 2020 â€" Rule 1(2), 4(2), 8, 9, 9(1), 9(2), 15
Tribunal, Appellate Tribunal And Other Authorities (Qualifications, Experience And Other Conditions Of Service of Members) (Amendment) Rules, 2021 â€" Rule 6
Tribunal Reforms (Rationalisation And Conditions Of Service) Ordinance, 2021 â€" Section 12, 13, 187(7)
Finance Act, 2017 â€" Section 174, 175, 183, 184, 184(1), 184(2), 184(3), 184(4), 184(5), 184(6), 184(7), 184(8), 184(9), 184(10), 184(11), 184(11)(i), 184(11)(ii), 185, 186, 186(2), 187, 188, 189
Companies Act, 2013 â€" Section 10-FE, 10-FT, 268, 408, 409(3)(a), 409(3)(c), 409(3)(e), 411(3), 412(2), 413, 414
Bombay Municipal Boroughs Act, 1925 â€" Section 73
Administrative Tribunals Act, 1985 â€" Section 28
Income Tax Act, 1961 â€" Section 293
Securities And Exchange Board Of India Act, 1992 â€" Section 20A
Recovery of Debts And Bankruptcy Act, 1993 â€" Section 18
Securitisation And Reconstruction Of Financial Assets And Enforcement Of Security Interest Act, 2002 â€" Section 34
Insolvency And Bankruptcy Code, 2016 â€" Section 231
Petroleum And Natural Gas Regulatory Board Act, 2006 â€" Section 56
Electricity Act, 2003 â€" Section 154
Telecom Regulatory Authority Of India Act, 1997 â€" Section 27
Competition Act, 2002 â€" Section 61
Code Of Civil Procedure, 1908 â€" Section 9

Citation: (2021) 8 Scale 174

Hon'ble Judges: L. Nageswara Rao, J; S. Ravindra Bhat, J; Hemant Gupta, J

Bench: Full Bench

Advocate: KK Venugopal, Balbir Singh, R. Balasubramanium, Zoheb Hossain, Shradha Deshmukh, Chinmayee Chandra, Shyam Gopal, Ankur Talwar, Suhasini Sen, Gurmeet Singh Makker, Anil Katiyar, Arvind P Datar, Rahul Unnikrishnan TVS Raghavendra Sreyas, Naveen Hegde, Siddharth Vasudev, Navdeep Singh, Gayatri Gulati, Sidharth Luthra, Sakshi Kakkar, Shakti Singh, Ankita Tiwari, Anmol Kheta, Sheezan Hashmi, Aruneshwar Gupta, Surajit Samanta , Pratiksha thakur, Swati Arya, Anika Dhingra, Abhishek Sharma, Rajeev Singh, Abhinav Mishra, Uddhav Khanna, Aruneshwar Gupta, C S Vaidyanathan, Nalin Talwar, Amish Tandon, Ayush Beotra, Dipin Tamang, Uddhav Khnna, Akshay Joshi, K.C. Kaushik, Rahul Kaushik, Bhuvneshwari Pathak, Shilpi Satyapriya Satyam, Pankaj Singh, Ranjana Singh, Gourab Benerjee, Rupesh Kumar, Nidad laud, Krishnan Venugopal, Shashikiran Shetty, Mahesh Thakur Kaushik Mishra Kiran Patel Viapsha Singh Ranjit Kumar, R. Gowrishankar, S. Rajappa, Gourav Agrawal, Chritarth Palli, Sahil Tagotra, Mukul Rohtagi, Paramjit Singh Patwalia, Rupesh Kumar, Rajeev Sharma Neelam Sharma, Pankhuri Shrivastava, Alekshendra Sharma, Pravesh Bahuguna, Mahesh Thakur, Rajeev Singh, P.B. Suresh, Krishna Dev Jagarlamudi, Sai Kaushal N., Sameer Abhyankar, T. V. S. Raghavendra Sreyas

Final Decision: Allowed

Judgement

L. Nageswara Rao, J

1. The Madras Bar Association has filed this Writ Petition seeking a declaration that Sections 12 and 13 of the Tribunal Reforms (Rationalisation and

Conditions of Service) Ordinance, 2021 and Sections 184 and 186 (2) of the Finance Act, 2017 as amended by the Tribunal Reforms (Rationalisation

and Conditions of Service) Ordinance, 2021 as ultra vires Articles 14, 21 and 50 of the Constitution of India inasmuch as these are violative of the

principles of separation of powers and independence of judiciary, apart from being contrary to the principles laid down by this Court in Union of India

v. R. Gandhi, President, Madras Bar Association (2010) 11 SCC 1, Madras Bar Association v. Union of India & Anr. (2014) 10 SCC 1, Rojer

Mathew v. South Indian Bank Limited & Ors. (2020) 6 SCC 1 and Madras Bar Association v. Union of India & Anr. (2020) SCC Online SC 962.

The Petitioner seeks a further direction to Respondent No.2 for establishment of a separate wing to cater to the requirements of tribunals in India.

2. A brief reference to the historical background of tribunalisation in this country is necessary for a better appreciation of the dispute that falls for

adjudication in this Writ Petition. The Statement of objects and reasons for insertion of Articles 323-A and 323-B in the Constitution of India by the

Forty-Second Amendment is as follows:

Ã¢â‚¬Å“To reduce the mounting arrears in High Courts and to secure the speedy disposal of service matters, revenue matters and certain

matters of special importance in the context of the socio-economic development and progress, it is considered expedient to provide for

administrative and other tribunals for dealing with such matters while preserving the jurisdiction of the Supreme Court in regard to such

matters under Articles 136 of the Constitution. It is also necessary to make certain modifications in the Writ Jurisdiction of the High Courts

under Article 226.Ã¢â‚¬â€‹

3. The vires of the Administrative Tribunals Act, 1985, enacted under Article 323-A (1), was challenged in S.P. Sampath Kumar v. Union of India &

Ors. (1987) 1 SCC 124 before this Court. The main ground taken in the writ petition was that the jurisdiction of the High Court under Article 226 and

Article 227 cannot be barred. It was held by this Court in S.P. Sampath Kumar (supra) that in place of a High Court, the Parliament can set up an

effective alternative institutional mechanism with the power of judicial review vested in it, by placing reliance on the observation made in Minerva

Mills Ltd. & Ors. v. Union of India & Ors. (1980) 3 SCC 625. However, this Court was of the firm opinion that the tribunals should be a real

substitute to High Courts. While scrutinizing Chapter II of the Act which dealt with the establishment of tribunals, this Court expressed its view that a

short tenure of Members of tribunals would be a deterrent for competent persons to seek appointment as Members.

4. The correctness of the judgment of this Court in S.P. Sampath Kumar (supra) was considered by a larger bench of this Court in L. Chandra Kumar

v. Union of India & Ors. (1997) 3 SCC 261 which found the exclusion of the jurisdiction of the High Courts and the Supreme Court in Articles 323-A

and 323-B to be unconstitutional. This Court declared that tribunals shall continue to act like courts of first instance in respect of areas of law for

which they have been constituted.

5. A High-Level Committee on law relating to insolvency of companies was constituted by the Union of India under the Chairmanship of Justice V.

Balakrishna Eradi, retired Judge of this Court who made certain recommendations for setting up the National Company Law Tribunal (hereinafter

referred to as NCLT) combining the powers of the Company Law Board under the Companies Act, 1956 (hereinafter referred to as the 1956 Act),

BIFR and AAIFR under the Sick Industrial Companies (Special Provisions) Act, 1985 and the jurisdiction and powers relating to winding up vested in

the High Courts. The Government accepted the recommendations and passed the Companies (Second Amendment) Act, 2002. The reason for the

said amendment was to avoid multiplicity of litigation before various fora and to reduce pendency of cases. The Madras Bar Association filed a writ

petition in the Madras High Court challenging the constitutional validity of the said amendment to the 1956 Act on the ground of legislative

incompetence and violation of the doctrines of separation of powers and independence of the judiciary. The High Court upheld the validity of the

Amendment Act of 2002 but pointed out certain defects in the provisions of the Act. The High Court declared that the NCLT and the National

Company Law Appellate Tribunal (hereinafter referred to as NCLAT) cannot be constituted without removing the defects pointed out in the

judgment. The judgment of the High Court was upheld by this Court in Union of India v. R. Gandhi, President, Madras Bar Association (2010) 11

SCC 1 (hereinafter referred to as MBA-I). Parts I-B and I-C of the 1956 Act were directed to be modified in accordance with the observations made

in the judgment.

6. The Companies Act, 2013 (hereinafter referred to as the 2013 Act), which replaced the 1956 Act, contained provisions for establishment of the

NCLT and the NCLAT. Madras Bar Association filed a writ petition under Article 32 of the Constitution challenging the formation of NCLT under

Section 408 of the 2013 Act. Several other provisions pertaining to constitution of the NCLT and the NCLAT, qualifications for appointment of

Members and Chairperson / President and constitution of the Selection Committee were also assailed in the said writ petition. This Court in Madras

Bar Association v. Union of India & Anr. (2015) 8 SCC 583 (hereinafter referred to as MBA-II) upheld the validity of Section 408 by which the

NCLT was constituted. However, clauses (a) and (e) of Section 409(3) relating to the appointment of Technical Members were held to be invalid.

Section 411(3), which provided qualifications of Technical Members, and Section 412(2), which dealt with the constitution of the Selection Committee,

were also held to be invalid. A direction was given to the Union of India to scrupulously follow the judgment in MBA-I and set right the defects that

were pointed out therein by bringing the provisions in accord with the MBA-I judgment.

7. The Finance Act, 2017 was brought into force from 31.03.2017 to give effect to the financial proposals for the financial year 2017-18. Sections 183

to 189 thereof dealt with conditions of service of Chairperson and Members of Tribunals, Appellate Tribunals and other authorities. According to

Section 183, provisions of Section 184 applied to the Chairperson, Vice-Chairperson, Chairman, Vice-Chairman, President, Vice-President, Presiding

Officer or Member of the Tribunal, Appellate Tribunal and other specified authorities, notwithstanding anything to the contrary contained in the

provisions of the statutes listed in Column (3) of the Eighth Schedule. The Central Government was empowered by Section 184 to make rules to

provide for qualifications, appointment, term of office, salaries and allowances, resignation, removal and other terms and conditions of service of the

Chairperson and Vice-Chairperson (and commensurate positions bearing different nomenclature) and other Members. As per the first proviso, the

Chairperson, Vice-Chairperson (and commensurate positions bearing different nomenclature) or Member of the Tribunal shall hold office for such

term as may be specified by the rules made by the Central Government, not exceeding five years from the date on which such person enters office.

The Chairperson, Chairman or President can hold office till they reach the age of 70 years and the Vice-Chairperson, Vice-Chairman, Vice-President,

Presiding Officer or any other Member can continue till the age of 67 years, as per the second proviso to Section 184.

8. A Notification was issued by the Central Government on 01.06.2017 by which the Tribunal, Appellate Tribunal and other Authorities (Qualifications,

Experience and other Conditions of Service of Members) Rules, 2017 (hereinafter referred to as the 2017 Rules) were made. The validity of Part

XIV of the Finance Act, 2017 and the 2017 Rules framed thereunder was questioned in Rojer Mathew (supra). The petitioners contended that para

XIV of the Finance Act, 2017 cannot be classified as a money bill. The question of money bill was referred to a larger bench. The validity of Section

184 of the Finance Act, 2017 was upheld. The 2017 Rules were held to be contrary to the parent amendment and therefore, struck down. The Central

Government was directed to reformulate the rules strictly in accordance with the principles delineated by this Court in R.K. Jain v. Union of India

(1993) 4 SCC 119, L. Chandra Kumar (supra), Madras Bar Association v. Union of India & Anr. (2014) 10 SCC 1 and Gujarat Urja Vikas Nigam

Ltd. v. Essar Power Ltd. (2016) 9 SCC 103 The Central Government was directed to formulate a new set of rules which would ensure non-

discriminatory and uniform conditions of service, including assured tenure. As an interim order, this Court in Rojer Mathew (supra) directed that the

appointments to the Tribunals/ Appellate Tribunals and the service conditions shall be in terms of the respective statutes before the enactment of the

Finance Bill, 2017. Union of India was given liberty to seek modification of the orders after framing fresh rules. On 12.02.2020, a notification was

issued by the Central Government by which the Tribunal, Appellate Tribunal and other Authorities (Qualifications, Experience and other Conditions of

Service of Members) Rules, 2020 (hereinafter referred to as the 2020 Rules) were framed. The validity of the 2020 Rules was challenged by Madras

Bar Association. After detailed deliberations on the issues involved, this Court by its judgment in Madras Bar Association v. Union of India & Anr.

(2020) SCC Online SC 962 (hereinafter referred to as MBA-III) disposed of the writ petition by issuing the following directions:

Ã¢â‚¬Å“53. The upshot of the above discussion leads this Court to issue the following directions:

(i) The Union of India shall constitute a National Tribunals Commission which shall act as an independent body to supervise the

appointments and functioning of Tribunals, as well as to conduct disciplinary proceedings against members of Tribunals and to take care of

administrative and infrastructural needs of the Tribunals, in an appropriate manner. Till the National Tribunals Commission is constituted, a

separate wing in the Ministry of Finance, Government of India shall be established to cater to the requirements of the Tribunals.

(ii) Instead of the four-member Search-cum-Selection Committees provided for in Column (4) of the Schedule to the 2020 Rules with the

Chief Justice of India or his nominee, outgoing or sitting Chairman or Chairperson or President of the Tribunal and two Secretaries to the

Government of India, the Search-cum-Selection Committees should comprise of the following members:

(a) The Chief Justice of India or his nomineeÃ¢â‚¬" Chairperson (with a casting vote).

(b) The outgoing Chairman or Chairperson or President of the Tribunal in case of appointment of the Chairman or Chairperson or

President of the Tribunal (or) the sitting Chairman or Chairperson or President of the Tribunal in case of appointment of other members of

the Tribunal (or) a retired Judge of the Supreme Court of India or a retired Chief Justice of a High Court in case the Chairman or

Chairperson or President of the Tribunal is not a Judicial member or if the Chairman or Chairperson or President of the Tribunal is seeking

re-appointmentÃ¢â‚¬"member;

(c) Secretary to the Ministry of Law and Justice, Government of IndiaÃ¢â‚¬"member;

(d) Secretary to the Government of India from a department other than the parent or sponsoring department, nominated by the Cabinet

Secretary Ã¢â‚¬"member;

(e) Secretary to the sponsoring or parent Ministry or DepartmentÃ¢â‚¬"Member Secretary/Convener (without a vote). Till amendments are

carried out, the 2020 Rules shall be read in the manner indicated.

(iii) Rule 4(2) of the 2020 Rules shall be amended to provide that the Search-cum-Selection Committee shall recommend the name of one

person for appointment to each post instead of a panel of two or three persons for appointment to each post. Another name may be

recommended to be included in the waiting list.

(iv) The Chairpersons, Vice-Chairpersons and the members of the Tribunal shall hold office for a term of five years and shall be eligible for

reappointment. Rule 9(2) of the 2020 Rules shall be amended to provide that the Vice-Chairman, Vice-Chairperson and Vice President and

other members shall hold office till they attain the age of sixty-seven years.

(v) The Union of India shall make serious efforts to provide suitable housing to the Chairman or Chairperson or President and other

members of the Tribunals. If providing housing is not possible, the Union of India shall pay the Chairman or Chairperson or President and

Vice-Chairman, Vice-Chairperson, Vice President of the Tribunals an amount of Rs. 1,50,000/- per month as house rent allowance and Rs.

1,25,000/- per month for other members of the Tribunals. This direction shall be effective from 01.01.2021.

(vi) The 2020 Rules shall be amended to make advocates with an experience of at least 10 years eligible for appointment as judicial

members in the Tribunals. While considering advocates for appointment as judicial members in the Tribunals, the Search-cum-Selection

Committee shall take into account the experience of the Advocate at the bar and their specialization in the relevant branches of law. They

shall be entitled for reappointment for at least one term by giving preference to the service rendered by them for the Tribunals.

(vii) The members of the Indian Legal Service shall be eligible for appointment as judicial members in the Tribunals, provided that they fulfil

the criteria applicable to advocates subject to suitability to be assessed by the Search-cum-Selection Committee on the basis of their

experience and knowledge in the specialized branch of law.

(viii) Rule 8 of the 2020 Rules shall be amended to reflect that the recommendations of the Search-cum-Selection Committee in matters of

disciplinary actions shall be final and the recommendations of the Search-cum-Selection Committee shall be implemented by the Central

Government.

(ix) The Union of India shall make appointments to Tribunals within three months from the date on which the Search-cum-Selection

Committee completes the selection process and makes its recommendations.

(x) The 2020 Rules shall have prospective effect and will be applicable from 12.02.2020, as per Rule 1(2) of the 2020 Rules.

(xi) Appointments made prior to the 2017 Rules are governed by the parent Acts and Rules which established the concerned Tribunals. In

view of the interim orders passed by the Court in Rojer Mathew (supra), appointments made during the pendency of Rojer Mathew (supra)

were also governed by the parent Acts and Rules. Any appointments that were made after the 2020 Rules came into force i.e. on or after

12.02.2020 shall be governed by the 2020 Rules subject to the modifications directed in the preceding paragraphs of this judgment.

(xii) Appointments made under the 2020 Rules till the date of this judgment, shall not be considered invalid, insofar as they conformed to the

recommendations of the Search-cum-Selection Committees in terms of the 2020 Rules. Such appointments are upheld, and shall not be called

into question on the ground that the Search-cum-Selection Committees which recommended the appointment of Chairman, Chairperson,

President or other members were in terms of the 2020 Rules, as they stood before the modifications directed in this judgment. They are, in

other words, saved.

(xiii) In case the Search-cum-Selection Committees have made recommendations after conducting selections in accordance with the 2020

Rules, appointments shall be made within three months from today and shall not be subject matter of challenge on the ground that they are

not in accord with this judgment.

(xiv) The terms and conditions relating to salary, benefits, allowances, house rent allowance etc. shall be in accordance with the terms

indicated in, and directed by this judgment.

(xv) The Chairpersons, Vice Chairpersons and members of the Tribunals appointed prior to 12.02.2020 shall be governed by the parent

statutes and Rules as per which they were appointed. The 2020 Rules shall be applicable with the modifications directed in the preceding

paragraphs to those who were appointed after 12.02.2020. While reserving the matter for judgment on 09.10.2020, we extended the term of

the Chairpersons, Vice-Chairpersons and members of the Tribunals till 31.12.2020. In view of the final judgment on the 2020 Rules, the

retirements of the Chairpersons, Vice-Chairpersons and the members of the Tribunals shall be in accordance with the applicable Rules as

mentioned above.Ã¢â‚¬â€‹

9. The Tribunal Reforms (Rationalisation and Conditions of Service) Bill, 2021 was introduced in the Lok Sabha on 13.02.2021 but could not be taken

up for consideration. According to the Statement of objects and reasons, the said Bill was proposed with a view to streamline tribunals and sought to

abolish certain tribunals and other authorities, which Ã¢â‚¬Å“only add to another additional layer of litigationÃ¢â‚¬ and were not Ã¢â‚¬Å“beneficial for the public at

largeÃ¢â‚¬. Thereafter, the Tribunal Reforms (Rationalisation and Conditions of Service) Ordinance, 2021 (hereinafter referred to as the Ordinance) was

promulgated on 04.04.2021. Chapter II thereof makes amendments to the Finance Act, 2017. The dispute raised in this Writ Petition relates to the first

proviso to Section 184(1) according to which a person below the age of 50 years shall not be eligible for appointment as Chairperson or Member and

also the second proviso, read with the third proviso, which stipulates that the allowances and benefits payable to Chairpersons and Members shall be

the same as a Central Government officer holding a post carrying the same pay as that of the Chairpersons and Members. Section 184(7) stipulates

that the Selection Committee shall recommend a panel of two names for appointment to the post of Chairperson or Member and the Central

Government shall take a decision preferably within three months from the date of the recommendation of the Committee, notwithstanding any

judgment, order or decree of any Court. The said provision is also assailed in this Writ Petition. Section 184 (11) which shall be deemed to have been

inserted with effect from 26.05.2017 provides that the term of office of the Chairperson and Member of a tribunal shall be four years. The age of

retirement of the Chairperson and Members is specified as 70 years and 67 years, respectively. If the term of office or the age of retirement specified

in the order of appointment issued by the Central Government for those who have been appointed between 26.05.2017 and 04.04.2021 is greater than

that specified in Section 184(11), the term of office or the age of retirement shall be as set out in the order of appointment, subject to a maximum term

of office of five years. The validity of Section 184(11) is also challenged in the Writ Petition.

10. We have heard Mr. Arvind P. Datar, learned Amicus Curiae, Mr. K.K. Venugopal, learned Attorney General for India, Mr. Balbir Singh, learned

Additional Solicitor General, Mr. Mukul Rohatgi, learned Senior Counsel, Mr. Sidharth Luthra, learned Senior Counsel, Mr. Gaurab Banerjee, learned

Senior Counsel, Mr. Aruneshwar Gupta, learned Senior Counsel and Mr. Krishnan Venugopal, learned Senior Counsel.

11. Mr. Arvind P. Datar, learned Amicus Curiae, made the following submissions:

i) The Ordinance is violative of the rule of separation of powers which forms part of the basic structure of the Constitution. The Ordinance is liable to

be struck down as being violative of another basic feature of the Constitution, i.e., independence of the judiciary.

ii) Reversal of judgments which are not in accord with the GovernmentÃ¢â‚¬â„¢s views undermines the judiciary, violating the supremacy of the

Constitution.

iii) Stipulation of a minimum age limit of 50 years for appointment is contrary to the directions given in the judgments of this Court in MBA-I, Rojer

Mathew (supra) and MBA-III.

iv) The provisos to Section 184(1) fixing the allowances and benefits payable to the Members to the extent as admissible to Central Government

officers holding a post carrying the same pay is unsustainable and requires to be set aside.

v) Section 184(7) is liable to be declared invalid as the direction issued by this Court in MBA-III to make appointments within three months from the

date of recommendation of the Selection Committee is sought to be annulled.

vi) Section 184(11) is unconstitutional insofar as it fixes the tenure of the Chairperson and Members as four years.

vii) Retrospectivity given to Section 184(11) is only to nullify the effect of interim orders of this Court which are in the nature of mandamus and is,

therefore, prohibited legislative activity.

viii) The appointments made pursuant to the directions of this Court on 09.02.2018, 16.07.2018 and 21.08.2018 with the consent of the learned

Attorney General cannot be disturbed. The directions issued by this Court with the consent of the Union of India cannot be legislatively overruled.

12. Mr. P.S. Patwalia, learned Senior Counsel appearing for Mr. P. Dinesha, Member, CESTAT, submitted that there are at least four orders passed

by this Court on 09.02.2018, 20.03.2018, 16.07.2018 and 21.08.2018 which clarified that the age of retirement would be 62 years for Members of the

CESTAT and the ITAT. Relying upon the judgment of this Court in Virender Singh Hooda & Ors. v. State of Haryana & Anr. (2004) 12 SCC 588,

he submitted that even if this Court upholds the Ordinance, the appointments made pursuant to the interim orders of this Court should not be disturbed.

13. Mr. Rohatgi, learned Senior Counsel, argued that Mr. Ajay Sharma who was practicing as an AOR in this Court responded to an advertisement

issued on 29.06.2016 for the appointment to the post of Member (Judicial), CESTAT. He was appointed along with others on 11.04.2018 with a

condition that his tenure will be for five years or till he attains the age of 65 years, whichever is earlier. This Court clarified on 21.08.2018 that the

retirement age of Member (Judicial), CESTAT shall be 62 years. Proviso to Section 184(11) which prescribes a maximum of five years tenure is a

result of an impermissible exercise undertaken by the Union of India. He further submitted that a mandamus issued by this Court cannot be overruled

by the legislature. Mr. Gaurab Banerjee, learned Senior Counsel, submitted that Mr. S.K. Pati was appointed Member (Judicial), CESTAT on

11.04.2018. He submitted that Mr. Pati left his employment as an Additional District Judge and joined as Member (Judicial). Mr. Sidharth Luthra,

learned Senior Counsel, submitted that Mrs. Rachna Gupta who is at present working as Member (Judicial) has resigned as District Judge. He

requested this Court to permit the Members, CESTAT and other tribunals to continue till 62 years as directed by this Court in its judgment in Kudrat

Sandhu v. Union of India W.P. No. 279 of 2017. Mr. Krishnan Venugopal, learned Senior Counsel appearing for AdvocatesÃ¢â‚¬â„¢ Association,

Bengaluru, which was interested in appointments being made to the posts of Judicial and Accountant Members of the ITAT, submitted that pursuant

to the advertisement issued on 06.07.2018 inviting applications to 37 posts of Members (Judicial)/ (Accountant) in the ITAT, 650 applications were

filed. The candidates between the age of 35 years and 50 years were eligible according to the advertisement. Interviews were held between May-

September, 2019. Appointments to the post of Accountant Members were made but the Judicial Members were not appointed. He submitted that

there are few persons who are below 50 years and would not be considered for appointment in view of the Ordinance. He argued that Section

184(11) alone is given retrospective effect and the amendments to Section 184(1) to (10) would be prospective and cannot be made applicable to the

recruitment and selection conducted prior to 04.04.2021. Therefore, according to Mr. Krishnan Venugopal, learned Senior Counsel, the candidates

who have been selected pursuant to the advertisement issued in 2018 should not be held ineligible on the ground that some of the candidates were

below the age of 50 years on the date of the advertisement.

14. The learned Attorney General strongly refuted the contentions of the learned Amicus Curiae and other Senior Counsel. He stated that a judgment

of a court can be overridden by the legislature. Service conditions of Members of tribunals is a policy decision which should be left to the collective

decision of the Parliament. Legislative overruling is a permissible exercise as has been held in a number of judgments of this Court. He asserted that

there can be no direction issued by this Court to make law in a particular manner. Such directions issued by this Court are treated as suggestions.

Ultimately, the will of the people has to prevail. Even interstitial directions given in the absence of law are subject to future legislation. He was of the

opinion that the Ordinance cannot be challenged on the ground that it is contrary to the judgment of this Court in MBA-III. The learned Attorney

General argued that the minimum age for appointment to tribunals is fixed at 50 years for the purpose of maintaining equality. All aspirants from

various fields have been put on an even keel. According to him, there is no uniformity in the directions issued by this Court regarding the tenure of

Chairperson and Members. Initially in S.P. Sampath Kumar (supra), this Court recommended five to seven years as tenure. Thereafter, directions

were issued to the effect that tenure should be five years. The learned Attorney General submitted that tenure of four years instead of five years was

fixed after detailed deliberations by experts which should not be interdicted by this Court. Insofar as HRA is concerned, the learned Attorney General

submitted that Members of tribunals cannot be permitted to claim allowances higher than officers in the Government carrying the same pay scale. In

respect of two names being sent for each post by the Selection Committee, the learned Attorney General stated that the recommendations are subject

to inquiry by the Intelligence Bureau (IB) and in case the selected candidate is found to be not suitable, there should be an alternative. Therefore, it

was decided that at least two names should be recommended by the Selection Committee for each post. The Government is also interested in filling up

the vacant posts in the tribunals and the stipulation of taking a decision preferably within three months does not mean that the Government will not act

with alacrity.

15. Mr. Balbir Singh, learned Additional Solicitor General defended the retrospectivity given to Section 184(11) by arguing that the defect pointed out

by the judgment of MBA-III has been cured by the Ordinance. It was held in MBA-III that the 2020 Rules came into force on the date of their

notification, i.e., 12.02.2020. Further, it was held that subordinate legislation cannot be given retrospective operation unless authorized by the parent

legislation. By the Ordinance, the Finance Act has been amended and retrospective effect has been given to Section 184(11). Any judgment or orders

passed between 26.05.2017 and 04.04.2021 are overridden by the Ordinance which is in the nature of a curative legislation. The learned ASG

submitted that all appointments that have been made between 26.05.2017 and 04.04.2021 shall be governed by the Ordinance.

16. Sir Edward Coke on being summoned by King James I to answer why the King could not himself decide cases which had to go before his own

Courts of justice, asserted: Ã¢â‚¬Å“... no king after the conquest assumed to himself to give any judgment in any cause whatsoever, which concerned the

administration of justice within his realm, but these were solely determined in the Courts of justiceÃ¢â‚¬. When the King said that Ã¢â‚¬Å“he thought the law

was founded on reason, and that he and others had reason, as well as the JudgesÃ¢â‚¬â€‹, Coke answered:

Ã¢â‚¬Å“True it was, that God had endowed His Majesty with excellent science, and great endowments of nature; but His Majesty was not

learned in the laws of his realm of England, and causes which concern the life, or inheritance, or goods, or fortunes of his subjects, are not

to be decided by natural reason, but by the artificial reason and judgment of the law, which law is an act which requires long study and

experience, before that a man can attain to the cognizance of it; and that the law was the golden metwand and measure to try the causes of

the subjects; and which protected His Majesty in safety and peace. (Ã¢â‚¬Å“The Higher Law Ã¢â‚¬"Background of American Constitutional LawÃ¢â‚¬â€‹

by Edward S. Corwin, pp. 38-39).Ã¢â‚¬â€‹ [Smt. Indira Nehru Gandhi v. Shri Raj Narain 1975 Supp SCC 1]

17. This dictum of Coke, announced in Dr Bohman case [(1610) 8 Co Rep 118-A] was soon repudiated in England, but the doctrine announced in

Coke's dictum found fertile soil in the United States and sprouted into such a vigorous growth that it was applied by the United States Supreme Court

in the decision of cases coming before it; and it has been said that the doctrine of the supremacy of the Supreme Court is the logical conclusion of

Coke's doctrine of control of the Courts over legislation (See: Willis on Constitutional Law, 1936 Edn., p. 76).

18. De lÃ¢â‚¬â„¢esprit des lois was published in 1748 by Charles de Secondat, Baron de Montesquieu. According to Montesquieu, there can be no liberty

where the legislative and executive powers are united in the same person or body of Magistrates. He argued that there is no liberty, if the judicial

power is not separated from the legislative and executive. He further noted that there would be an end of everything, were the same man or same

body, whether of the nobles or of the people, to exercise those three powers, that of enacting laws, that of executing the public resolutions, and of

trying the causes of individuals.

19. The Federalist Papers were written by Alexander Hamilton, James Madison, and John Jay under the collective pseudonym ""Publius"" to promote

the ratification of the United States Constitution. James Madison dealt with the particular structure of the new government and the distribution of

powers among its different parts in Federalist No.47 and separation of the departments not having constitutional control over each other in Federalist

No.48. The structure of the Government furnishing proper checks and balances between different departments was the subject matter of Federalist

No.51.

20. All powers of Government Ã¢â‚¬" legislative, executive and judicial Ã¢â‚¬" result in the legislative body. The concentration of these powers in the same

hands is precisely the definition of despotic Government. It will be no alleviation that these powers will be exercised by a plurality of hands and not by

a single person. One hundred and seventy-three despots would surely be as oppressive as one. [See: Jefferson : Works : 3, 223]

21. The American Constitution provides for a rigid separation of governmental powers into three basic divisions, executive, legislative and judiciary. It

is an essential principle of that Constitution that powers entrusted to one department should not be exercised by any other department. The Australian

Constitution follows the same pattern of the separation of powers. Unlike these Constitutions, Indian Constitution does not expressly vest the three

kinds of powers in three different organs of the State. [Smt. Indira Nehru Gandhi v. Shri Raj Narain (supra)]

22. The doctrine of separation of powers informs the Indian constitutional structure and is an essential constituent of rule of law. In other words, the

doctrine of separation of powers, though not expressly engrafted in the Constitution, its sweep, operation and visibility are apparent from the scheme

of the Indian Constitution. The Constitution has made demarcation, without drawing formal lines between the three organsÃ¢â‚¬" legislature, executive

and judiciary. Separation of powers between three organsÃ¢â‚¬"the legislature, executive and judiciaryÃ¢â‚¬"is also nothing but a consequence of principles

of equality enshrined in Article 14 of the Constitution of India. Accordingly, breach of separation of judicial power may amount to negation of equality

under Article 14. Stated thus, a legislation can be invalidated on the basis of breach of the separation of powers since such breach is negation of

equality under Article 14 of the Constitution. [State of Tamil Nadu v. State of Kerala & Anr. (2014) 12 SCC 696] Equality, rule of law, judicial review

and separation of powers form parts of the basic structure of the Constitution. Each of these concepts are intimately connected. There can be no rule

of law, if there is no equality before the law. These would be meaningless if the violation was not subject to the judicial review. All these would be

redundant if the legislative, executive and judicial powers are vested in one organ. Therefore, the duty to decide whether the limits have been

transgressed has been placed on the judiciary. [I.R. Coelho v. State of T.N. (2007) 2 SCC 1] Though, there is no rigid separation of governmental

powers between the executive, legislative and judiciary, it is clear from the above judicial pronouncements and literature that separation of powers

forms part of the basic structure of the Constitution. Violation of separation of powers would result in infringement of Article 14 of the Constitution. A

legislation can be declared as unconstitutional if it is in violation of the principle of separation of powers.

Independence of the Judiciary

23. Alexander Hamilton wrote in The Federalist No.78 as follows:

Ã¢â‚¬Å“The complete independence of the courts of justice is peculiarly essential in a limited Constitution. By a limited Constitution, I

understand one which contains certain specified exceptions to the legislative authority; such, for instance, that it shall pass no bills of

attainder, no ex post facto laws, and the like. Limitations of this kind can be preserved in practice in no other way than through the medium

of courts of justice, whose duty it must be to declare all acts contrary to the manifest tenor of the Constitution void. Without this, all the

reservations of particular rights or privileges would amount to nothing.Ã¢â‚¬â€‹

24. Basic Principles on the Independence of the Judiciary were adopted by the 7th United Nations Congress on the Prevention of Crime and the

Treatment of Offenders held at Milan from 26.08.1985 to 06.09.1985 and endorsed by the General Assembly resolutions on 29.11.1985 and

13.12.1985. The relevant basic principles are that the independence of the judiciary shall be guaranteed by the State and enshrined in the Constitution

or the law of the country. It is the duty of the governmental and other institutions to respect and observe the independence of the judiciary. The term

of office of Judges, their independence, security, adequate renumeration, conditions of service, pensions and the age of retirement shall be adequately

secured by law. The United Nations Economic and Social Council authorized the UN Sub-Commission on Prevention of Discrimination and Protection

of Minorities to request Dr. L.M. Singhvi to prepare a report on the independence and impartiality of judiciary. He submitted a draft declaration on the

independence and impartiality of the judiciary, jurors, assessors and the independence of lawyers, which came to be known as the Singhvi Declaration.

The United Nations Commission on Human Rights invited governments to take the Singhvi Declaration into account in implementing the Basic

Principles on the Independence of the Judiciary. The Bangalore Principles on Judicial Conduct, the product of several meetings and deliberations of

Chief Justices and Judges of both common law and civil law systems and adopted by the United Nations Commission on Human Rights on 29.04.2003,

identified core values of the judiciary, one of which is independence. The measures adopted by the Judicial Integrity Group at its meeting held in

Lusaka, Zambia on 21st and 22nd January, 2010 for effective implementation of the Bangalore Principles of Judicial Conduct referred to the

responsibilities of States to ensure guarantees, through constitutional or other means, on judicial independence. One of the guarantees required to be

provided by the State to maintain judicial independence is that the legislative or executive powers that may affect Judges in respect of their office,

their renumeration, conditions of service or other resources, shall not be used with the object or consequence of threatening or bringing pressure upon

a particular Judge or Judges.

25. In his address dated 24.05.1949, Dr. B.R. Ambedkar stated that: -

Ã¢â‚¬Å“There can be no difference of opinion in the House that our judiciary must be both independent of the executive and must also be

competent in itself. And the question is how these two objects can be securedÃ¢â‚¬â€‹.

26. Article 50 of the Constitution of India provides that the State shall take steps to separate the judiciary from the executive in the public services of

the State. The concept of separation of judiciary from executive cannot be confined only to the subordinate judiciary, totally discarding the higher

judiciary. If such a narrow and pedantic or syllogistic approach is made and a constricted construction is given, it would lead to an anomalous position

that the Constitution does not emphasise the separation of higher judiciary from the executive [Supreme Court Advocates-on-Record Association &

Ors. v. Union of India (1993) 4 SCC 441]. Article 50, occurring in a chapter described by Granville Austin as Ã¢â‚¬Å“the conscience of the ConstitutionÃ¢â‚¬

in his work titled Ã¢â‚¬ËœThe Indian Constitution: Cornerstone of a NationÃ¢â‚¬â„¢, underlines the importance given by the Constitution-makers to immunize

the judiciary from any form of executive control or interference. [Union of India v. Sankalchand Himatlal Sheth & Anr. (1977) 4 SCC 193]

27. The independence of the judiciary is a fighting faith of our Constitution. It is the cardinal principle of the Constitution that an independent judiciary

is the most essential characteristic of a free society like ours and the judiciary which is to act as a bastion of the rights and freedom of the people is

given certain constitutional guarantees to safeguard the independence of judiciary. An independent and efficient judicial system has been recognised

as a part of the basic structure of our Constitution. [Supreme Court Advocates-on-Record Association & Ors. v. Union of India (supra)]

28. Article 37 of the Constitution declares that the principles laid down in Part IV of the Constitution are fundamental in the governance of the country

and it should be the duty of the State to apply the principles in making laws. Undoubtedly, it is true that the provisions of Part IV are not enforceable

by the courts of law. However, this does not absolve the obligation of the State from applying the principles of Part IV in making laws. It is necessary

to remind ourselves of what Dr. B.R. Ambedkar stated in the Constituent Assembly on 19.11.1948 of Part IV, which is as under: -

Ã¢â‚¬Å“It is the intention of this Assembly that in future both the legislature and the executive should not merely pay lip services to the principles

enacted in this part, but they should be made the basis of all executive and legislative action that may be taken hereafter in the matter of

governance of the countryÃ¢â‚¬â€‹.

29. Impartiality, independence, fairness and reasonableness in decision-making are the hallmarks of the judiciary. If Ã¢â‚¬Å“impartialityÃ¢â‚¬ is the soul of the

judiciary, Ã¢â‚¬Å“independenceÃ¢â‚¬ is the lifeblood of the judiciary. Without independence, impartiality cannot thrive. Independence is not the freedom for

Judges to do what they like. It is the independence of judicial thought. It is the freedom from interference and pressures which provides the judicial

atmosphere where he can work with absolute commitment to the cause of justice and constitutional values. It is also the discipline in life, habits and

outlook that enables a Judge to be impartial. Its existence depends however not only on philosophical, ethical or moral aspects but also upon several

mundane thingsÃ¢â‚¬"security in tenure, freedom from ordinary monetary worries, freedom from influences and pressures within (from others in the

judiciary) and without (from the executive) MBA-I. The independence of an individual Judge, that is, decisional independence; and independence of

the judiciary as an institution or an organ of the State, that is, functional independence are the broad concepts of the principle of independence of the

judiciary/ tribunal [Supreme Court Advocates-on-Record Association & Anr. v. Union of India (2016) 5 SCC 1].

30. Individual independence has various facets which include security of tenure, procedure for renewal, terms and conditions of service like salary,

allowances, etc. which should be fair and just and which should be protected and not varied to his/her disadvantage after appointment. Independence

of the institution refers to sufficient degree of separation from other branches of the Government, especially when the branch is a litigant or one of the

parties before the tribunal. Functional independence would include method of selection and qualifications prescribed, as independence begins with

appointment of persons of calibre, ability and integrity. Protection from interference and independence from the executive pressure, fearlessness from

other power centres Ã¢â‚¬" economic and political, and freedom from prejudices acquired and nurtured by the class to which the adjudicator belongs, are

important attributes of institutional independence Rojer Mathew (supra).

31. The fundamental right to equality before law and equal protection of laws guaranteed by Article 14 of the Constitution, clearly includes a right to

have the personÃ¢â‚¬â„¢s rights adjudicated by a forum which exercises judicial power in an impartial and independent manner. [MBA-I]

32. The constitutional mandate is that the legislature should adhere to the principles laid down in Part IV of the Constitution of India while enacting

legislations. No provision shall be made in legislative acts which would have the tendency of making inroads into the judicial sphere. Any such

encroachment by the legislature would amount to violating the principles of separation of powers, judicial independence and the rule of law.

Independence of courts from the executive and the legislature is fundamental to the rule of law and one of the basic tenets of the Indian Constitution.

Separation of powers between the three organs, i.e., the legislature, the executive and the judiciary, is a consequence of the principles of equality as

enshrined in Article 14 of the Constitution [State of Tamil Nadu v. State of Kerala & Anr. (supra)]. Any incursion into the judicial domain by the other

two wings of the Government would, thus, be unconstitutional.

Judicial decisions and legislative overruling

I. Comparative Jurisdictions

33. It would be profitable to refer to the reaction of courts to legislative override in comparative jurisdictions. Chief Justice John Marshall of the US

Supreme Court in Marbury v. Madison 5 U.S. 137 (1803) referred to the Constitution as the fundamental and paramount law of the nation. He

declared that Ã¢â‚¬Å“It is emphatically the province and duty of the judicial department to say what the law is.Ã¢â‚¬ In United States v. Peters U.S. 115

(1809), Chief Justice Marshall speaking for an unanimous Court said that Ã¢â‚¬Å“If the legislatures of the several states may at will annul the judgments

of the Courts of the United States, and destroy rights acquired under those judgments, the Constitution itself becomes a solemn mockeryÃ¢â‚¬Â¦Ã¢â‚¬â€¹

34. In Brown v. Board of Education of Topeka 347 U.S. 483 (1954), the United States Supreme Court held that the Fourteenth Amendment forbids

states to use governmental powers to bar children on racial grounds from attending school where there is statesÃ¢â‚¬â„¢ participation through any

arrangement, management, funds or property. The Governor or legislature cannot declare that they are not bound by the judgment mentioned above.

The Board of Little RockÃ¢â‚¬â„¢s Central High School suspended its plan to do away with desegregation in public schools. The said action of the school

was rejected by the District Court which was affirmed by the Court of Appeal.

There was an amendment to the Arkansas Constitution pursuant to which a law was made relieving school children from compulsory attendance at

racially mixed schools. The school filed a petition in the District Court seeking postponement of the programme of desegregation. The District Court

allowed the writ petition. The Court of Appeal reversed the decision of the District Court which was affirmed by the United States Supreme Court in

Cooper v. Aaron 358 U.S. 1 (1958). It was held therein that the constitutional rights of children not to be discriminated against in school admissions on

grounds of race or color as declared by the United States Supreme Court in the Brown case can neither be nullified openly and directly by state

legislators or state executives or judicial officers, nor nullified indirectly by them through evasive schemes for segregation. The Supreme Court

declared that the principles announced in the decision of Brown v. Board of Education (supra) are indispensable for the protection of the freedoms

guaranteed by the fundamental charter.

35. Chief Justice Warren speaking for the majority in Miranda v. Arizona 384 U.S. 436 (1966), declared that a person in custody must, prior to

interrogation, be clearly informed that he has the right to remain silent, and that anything he says will be used against him in a court. He must be

clearly informed that he has the right to consult with a lawyer and have the lawyer with him during interrogation and, that, if he is indigent, a lawyer

will be appointed to represent him. The Congress enacted Ã‚Â§ 3501 which provided that a confession shall be admissible in criminal prosecution

brought by the United States or by the District of Columbia if it is voluntarily given. Charles Thomas Dickerson charged with a robbery and use of a

firearm moved the District Court to suppress his statement which he made to the Federal Bureau of Investigation (FBI) that he has not received

Miranda warnings. The motion to suppress was quashed by the District Court which was reversed by the United States Court of Appeal for the

Fourth Circuit on the basis of the enactment Ã‚Â§ 3501. The United States Supreme Court in Dickerson v. United States 530 U.S. 428 (2000)

authoritatively pronounced that the Congress cannot legislatively supersede a decision of the Supreme Court interpreting and applying the Constitution.

As Miranda amounts to a constitutional rule, the Supreme Court concluded that the Congress cannot supersede the judgment legislatively. The learned

Attorney General referred to an article written by Erwin Chemerinsky titled Ã¢â‚¬Å“The Court should have remained silent: Why the Court erred in

deciding Dickerson v. United StatesÃ¢â‚¬ [Erwin Chemerinsky, The Court Should Have Remained Silent: Why the Court Erred in Deciding Dickerson v.

United States, 149 Pennsylvania Law Review 287 -308 (2001)]. The said article is a critical analysis of the judgment of the Supreme Court in

Dickerson wherein the author wrote that the desire to rule on the constitutionality of the law simply does not justify the courts raising it sua sponte. He

opined that the Fourth Circuit and ultimately the Supreme Court violated the separation of powers by considering Ã‚Â§ 3501 over the objection of the

executive branch. In Dickerson, the justice department informed the Supreme Court that it was not invoking Ã‚Â§ 3501 and that it could not use the

confession only if the Court found that Miranda warnings were not properly administered. In spite of the submission made by the justice department,

the Fourth Circuit ruled on the admissibility of the confession on the basis of Ã‚Â§ 3501. Chemerinsky argues in his article that the judiciary exceeded its

jurisdiction in considering Ã‚Â§ 3501 when none of the parties raised the issue.

36. Justice Scalia speaking for the majority in Plaut v. Spendthrift Farm, Inc 514 U.S. 211 (1995)] referred to earlier judgments of the United States

Supreme Court which held that a judicial decision becomes the last word of the judicial department with regard to a particular case or controversy, and

the Congress may not declare by retrospective action that the law applicable to that very case or a whole class of cases was something other than

what the courts said it was. Justice Scalia held that depriving judicial judgments of the conclusive effect that they had when they were announced

would be in violation of separation of powers.

37. In his article, Ã¢â‚¬Å“The Case for the Legislative OverrideÃ¢â‚¬ [Nicholas Stephanopoulos, The Case for the Legislative Override, 10 UCLA Journal of

International Law and Foreign Affairs 250 (2005)], Nicholas Stephanopoulos has explored the response of courts to legislative overruling in various

jurisdictions. Judicial review of legislative action is limited in United Kingdom and New Zealand as the interpretation of statutes would be in

accordance with the European Convention of Human Rights and the New Zealand Bill of Rights, respectively. The Courts in United Kingdom and

New Zealand follow hortatory judicial review by which the Court cannot strike down a legislation but can declare it to be incompatible with the

European Convention or the Bill of Rights. As far as Germany is concerned, statutes would be stricken if they are declared unconstitutional by the

courts, and would be unrescuable by constitutional amendment if they are found to violate certain unamendable constitutional provisions. If the statutes

are invalidated on being found unconstitutional by the courts in Canada and Israel, the legislature could override the judgments of the courts leveraging

what is termed as the Ã¢â‚¬Ëœnotwithstanding Ã¢â‚¬â„¢ clause in the Canadian context, i.e., notwithstanding their conflict with the Charter or Basic Law.

II. India

(A) Scope of judicial review

38. Shifting focus to legislative override in our country, it is necessary to first appreciate the scope of judicial review of ordinances which is the same

as that of a legislative act. Article 123 of the Constitution empowers the President to promulgate an ordinance during recess of the Parliament, which

shall have the same force and effect as an act of the Parliament. The validity of an ordinance can be challenged on grounds available for judicial

review of a legislative act. An ordinance passed either under Article 123 or under Article 213 of the Constitution stands on the same footing. When

the Constitution says that the ordinance-making power is legislative power and an ordinance shall have the same force as an act, an ordinance should

be clothed with all the attributes of an act of legislature carrying with it all its incidents, immunities and limitations under the Constitution.

It is settled law that judicial review of an ordinance should be akin to that of legislative action. [R.K. Garg v. Union of India & Ors. (1981) 4 SCC 675;

T. Venkata Reddy & Ors. v. State of Andhra Pradesh (1985) 3 SCC 198; Krishna Kumar Singh & Anr. v. State of Bihar & Ors. (2017) 3 SCC 1.]

39. The controversy that arises for the consideration of this Court relates to the legislative response to the judgment of this Court in MBA-III. The

power to strike down primary legislation enacted by the Union of India or the State legislatures is on limited grounds. The Courts can strike down

legislation either on the basis that it falls foul of federal distribution of powers or that it contravenes fundamental rights or other constitutional

rights/provisions of the Constitution of India. [Binoy Vishwam v. Union of India & Ors. (2017) 7 SCC 59] Where there is challenge to the

constitutional validity of a law enacted by the legislature, the Court must keep in view that there is always a presumption of constitutionality of an

enactment and a clear transgression of constitutional principles must be shown. In State of Madhya Pradesh v. Rakesh Kohli & Anr. (2012) 6 SCC

312, this Court held that sans flagrant violation of the constitutional provisions, the law made by Parliament or a State legislature is not declared bad

and legislative enactment can be struck down only on two grounds: (i) that the appropriate legislature does not have the competence to make the law,

and (ii) that it takes away or abridges any of the fundamental rights enumerated in Part III of the Constitution or any other constitutional provisions.

Subsequently, the Court has also recognised Ã¢â‚¬Å“manifest arbitrarinessÃ¢â‚¬ as a ground under Article 14 on the basis of which a legislative enactment

can be judicially reviewed. [K.S. Puttaswamy & Anr. v. Union of India & Anr. (2019) 1 SCC 1]

(B) Permissible legislative overruling

40. The judgment in Shri Prithvi Cotton Mills Ltd. & Anr. v. Broach Borough Municipality & Ors. (1969) 2 SCC 283 was relied upon by both sides.

The validity of the rules framed by Municipal Corporation under Section 73 of the Bombay Municipal Boroughs Act, 1925 for levying a rate on open

lands was the subject matter of challenge in Patel Gordhandas Hargovindas & Ors. v. Municipal Commissioner, Ahmedabad & Anr (1964) 2 SCR

608. The relevant rule was declared ultra vires of the Act itself. Later, the State legislature passed a validation act seeking to validate the imposition of

tax, the validity of which was considered in Shri Prithvi Cotton Mills Ltd. (supra). This Court held that it is not sufficient to merely declare that the

decision of the Court shall not bind as such declaration would amount to the reversal of a decision of the Court which the legislature cannot do. It was

further observed that a CourtÃ¢â‚¬â„¢s decision must always bind unless the conditions on which it is based are so fundamentally altered that the decision

could not have been given in the altered circumstances.

41. It is open to the legislature within certain limits to amend the provisions of an Act retrospectively and to declare what the law shall be deemed to

have been, but it is not open to the legislature to say that a judgment of a Court properly constituted and rendered in exercise of its powers in a matter

brought before it shall be deemed to be ineffective and the interpretation of the law shall be otherwise than as declared by the Court. [Janapada Sabha

Chhindwara v. Central Provinces Syndicate Ltd. & Anr. (1970) 1 SCC 509] The test of judging the validity of the amending and validating enactment

is, whether the legislature enacting the validating statute has competence over the subject-matter; whether by validation, the said legislature has

removed the defect which the Court had found in the previous laws; and whether the validating law is consistent with the provisions of Part III of the

Constitution. [I.N. Saksena v. State of Madhya Pradesh (1976) 4 SCC 750; Indian Aluminium Co. & Ors. v. State of Kerala & Ors. (1996) 7 SCC

637; Bakhtawar Trust & Ors. v. M. D. Narayan & Ors. (2003) 5 SCC 298] In State of Tamil Nadu v. State of Kerala & Anr. (supra), this Court held

that any law enacted by the legislature may be invalidated if it is an attempt to interfere with judicial process by being in breach of the doctrine of

separation of powers.

42. The judgment of this Court in Madan Mohan Pathak & Anr. v. Union of India & Ors. (1978) 2 SCC 50 requires a close scrutiny as it was

adverted to and relied upon by both sides. A writ petition was filed in the High Court of Calcutta for a mandamus directing the Life Insurance

Corporation (LIC) to act in accordance with the terms of settlement dated 24.01.1974 read with administrative instructions dated 29.03.1974. The writ

petition was allowed by the learned single Judge against which a Letters Patent Appeal (LPA) was preferred by the LIC. During the pendency of the

LPA, the LIC (Modification of Settlement) Act, 1976 came into force. The LPA was withdrawn in view of the subsequent legislation and the decision

of the learned single Judge became final. Validity of the said statute was assailed in a writ petition filed under Article 32 by the employees of the LIC.

Justice Bhagwati, speaking for the majority, was of the opinion that the judgment of the Calcutta High Court was not a mere declaratory judgment

holding an impost or tax as invalid so that a validating statute can remove the defect pointed out in the judgment. He observed that the judgment of the

Calcutta High Court gave effect to the rights of the petitioners by mandamus, directing the LIC to pay annual cash bonus. As long as the judgment of

the learned single Judge is not reversed in appeal, it cannot be disregarded or ignored. The LIC was held to be bound by the writ of mandamus issued

by the Calcutta High Court. Justice Beg, in his concurrent opinion, held that the rights which accrued to the employees on the basis of the mandamus

issued by the High Court cannot be taken away either directly or indirectly by subsequent legislation. Thereafter, Madan Mohan Pathak (supra) came

up for discussion in Sri Ranga Match Industries & Ors. v. Union of India & Ors. 1994 Supp (2) SCC 726. Justice Jeevan Reddy was of the opinion

that the Madan Mohan Pathak case cannot be treated as an authority for the proposition that mandamus cannot be set aside by a legislative act.

Justice Hansaria was not in agreement with such view. Relying upon the judgment of this Court in A.V. Nachane & Anr. v. Union of India & Anr.

(1982) 1 SCC 205, Justice Hansaria held that the legal stand taken by Justice Beg in the Madan Mohan Pathak case had received majorityÃ¢â‚¬â„¢s

endorsement and it was because of this that retrospectivity given to the relevant rule assailed in A.V. Nachane was held to have nullified the effect of

the writ and was accordingly invalid. In view of the difference of opinion, the matter was referred to a larger bench. We are informed by the leaned

Amicus Curiae that the difference of opinion could not be resolved as the case was settled out of court.

43. In Virender Singh Hooda (supra), this Court did not accept the contention of the petitioners therein that vested rights cannot be taken away by

retrospective legislation. However, it was observed that taking away of such rights would be impermissible if there is violation of Articles 14, 16 or any

other constitutional provision. The appointments already made in implementation of a decision of this Court were protected with the reason that

Ã¢â‚¬Å“the law does not permit the legislature to take away what has been granted in implementation of the CourtÃ¢â‚¬â„¢s decision. Such a course is

impermissible.Ã¢â‚¬ This Court in Cauvery Water Disputes Tribunal 1993 Supp (1) SCC 96 (2) declared the ordinance which sought to displace an

interim order passed by the statutory tribunal as unconstitutional as it set side an individual decision inter partes and therefore, amounted to a legislative

exercise of judicial power. When a mandamus issued by the Mysore High Court was sought to be annulled by a legislation, this Court quashed the

same in S.R. Bhagwat & Ors. v. State of Mysore (1995) 6 SCC 16 on the ground that it was impermissible legislative exercise. Setting at naught a

decision of the Court without removing the defect pointed out in the judgment would sound the death knell of the rule of law. The rule of law would

cease to have any meaning, because then it would be open to the Government to defy a law and yet to get away with it. [P. Sambamurthy & Ors. v.

State of Andhra Pradesh & Anr. (1987) 1 SCC 362]

44. The permissibility of legislative override in this country should be in accordance with the principles laid down by this Court in the aforementioned

as well as other judgments, which have been culled out as under:

a) The effect of the judgments of the Court can be nullified by a legislative act removing the basis of the judgment. Such law can be retrospective.

Retrospective amendment should be reasonable and not arbitrary and must not be violative of the fundamental rights guaranteed under the

Constitution. [Lohia Machines Ltd. & Anr. v. Union of India & Ors. (1985) 2 SCC 197]

b) The test for determining the validity of a validating legislation is that the judgment pointing out the defect would not have been passed, if the altered

position as sought to be brought in by the validating statute existed before the Court at the time of rendering its judgment. In other words, the defect

pointed out should have been cured such that the basis of the judgement pointing out the defect is removed.

c) Nullification of mandamus by an enactment would be impermissible legislative exercise [See: S.R. Bhagwat (supra)]. Even interim directions

cannot be reversed by a legislative veto [See: Cauvery Water Disputes Tribunal (supra) and Medical Council of India v. State of Kerala & Ors.

(2019) 13 SCC 185].

d) Transgression of constitutional limitations and intrusion into the judicial power by the legislature is violative of the principle of separation of powers,

the rule of law and of Article 14 of the Constitution of India.

Validity of the Impugned Ordinance

45. The learned Amicus Curiae submitted that the Ordinance impugned in the Writ Petition is unconstitutional as it is violative of the separation of

powers, the rule of law and independence of the judiciary. He argued that the principle of independence of the judiciary can be traced to Article 14 of

the Constitution and the Ordinance is liable to be struck down as being violative of the equality clause. The learned Amicus Curiae relied upon the

judgments of this Court to submit that the impugned Ordinance is a classic case of law laid down by this Court being overturned by the legislature

unreasonably. Responding to the submissions of the learned Attorney General that deference has to be shown by courts to the policy decisions of the

executive and the legislature, the learned Amicus Curiae argued that deference has to be shown to the reasons of the policy and not the policy itself.

The learned Attorney General asserted that the law laid down by this Court is not the final word as it is settled that the Parliament can legislate by

curing the defects pointed out by the Court. The learned Attorney General stated that legislation is made after the decision undergoes detailed

deliberations at various levels in the Government and the legislature. The collective wisdom of the Parliament cannot be interfered with by the Court.

He emphasized that service conditions of Chairperson and Members of tribunals is a matter of policy over which the Parliament should have the final

word. He stressed the need for judicial restraint to be shown by courts in giving directions to legislate. He stated that any interstitial directions given by

this Court in the absence of any existing legislation shall be treated as suggestions to the Parliament for consideration at the time of making legislation.

He insisted that a later legislation cannot be struck down on the ground that the directions issued by the Court earlier are violated. Judicial review of

the Ordinance can be only on those grounds that are available for review of a legislative act. The Ordinance cannot be declared as unconstitutional as

being violative of Article 14, as no facet of the said Article comes into play in the instant case.

46. The grievance of the Petitioners in this Writ Petition mainly relates to the violation of the first proviso and the second proviso, read with the third

proviso, to Section 184 (1), Sections 184(7) and 184(11) of the Finance Act, 2017. Section 184(1) of the Finance Act, 2017, prior to amendment, is as

follows:

(1) The Central Government may, by notification, make rules to provide for qualifications, appointment, term of office, salaries and

allowances, resignation, removal and the other terms and conditions of service of the Chairperson, Vice-Chairperson, Chairman, Vice-

Chairman, President, Vice-President, Presiding Officer or Member of the Tribunal, Appellate Tribunal or, as the case may be, other

Authorities as specified in column (2) of the Eighth Schedule:

Provided that the Chairperson, Vice-Chairperson, Chairman, Vice-Chairman, President, Vice-President, Presiding Officer or Member of the

Tribunal, Appellate Tribunal or other Authority shall hold office for such term as specified in the rules made by the Central Government but

not exceeding five years from the date on which he enters upon his office and shall be eligible for reappointment:

Provided further that no Chairperson, Vice-Chairperson, Chairman, Vice-Chairman, President, Vice-President, Presiding Officer or

Member shall hold office as such after he has attained such age as specified in the rules made by the Central Government which shall not

exceed, Ã¢â,¬

(a) in the case of Chairperson, Chairman [President or the Presiding Officer of the Securities Appellate Tribunal], the age of seventy years;

(b) in the case of Vice-Chairperson, Vice-Chairman, Vice-President, Presiding Officer [of the Industrial Tribunal constituted by the Central

Government and the Debts Recovery Tribunal] or any other Member, the age of sixty-seven years:

47. The amendment to Section 184 by the Ordinance is as follows:

184. (1) The Central Government may, by notification, make rules to provide for the qualifications, appointment, salaries and allowances,

resignation, removal and the other conditions of service of the Chairperson and Members of the Tribunal as specified in the Eighth

Schedule:

Provided that a person who has not completed the age of fifty years shall not be eligible for appointment as a Chairperson or Member:

Provided further that the allowances and benefits so payable shall be to the extent as are admissible to a Central Government officer

holding the post carrying the same pay:

Provided also that where the Chairperson or Member takes a house on rent, he may be reimbursed a house rent subject to such limits and

conditions as may be provided by rules.

(2) The Chairperson and Members of a Tribunal shall be appointed by the Central Government on the recommendation of a Search-cum-

Selection Committee (hereinafter referred to as the Committee) constituted under sub-section (3), in such manner as the Central Government

may, by rules, provide.

(3) The Search-cum-Selection Committee shall consist ofÃ¢â,¬

(a) the Chief Justice of India or a Judge of Supreme Court nominated by himÃ¢â,¬"Ã¢â,¬" Chairperson of the Committee;

(b) two Secretaries nominated by the Government of India Ã¢â,¬"Ã¢â,¬" Members;

(c) one Member, whoÃ¢â,¬"Ã¢â,¬

(i) in case of appointment of a Chairperson of a Tribunal, shall be the outgoing Chairperson of the Tribunal; or

(ii) in case of appointment of a Member of a Tribunal, shall be the sitting Chairperson of the Tribunal; or

(iii) in case of the Chairperson of the Tribunal seeking re-appointment, shall be a retired Judge of the Supreme Court or a retired Chief

Justice of a High Court nominated by the Chief Justice of India:

Provided that, in the following cases, such Member shall always be a retired Judge of the Supreme Court or a retired Chief Justice of a

High Court nominated by the Chief Justice of India, namely: Ã¢â‚¬"Ã¢â‚¬¬

(i) Industrial Tribunal constituted by the Central Government under the Industrial Disputes Act, 1947;

(ii) Tribunals and Appellate Tribunals constituted under the Recovery of Debts Due to Banks and Financial Institutions Act, 1993;

(iii) Tribunals where the Chairperson or the outgoing Chairperson, as the case may be, of the Tribunal is not a retired Judge of the

Supreme Court or a retired Chief Justice or Judge of a High Court; and

(iv) such other Tribunals as may be notified by the Central Government in consultation with the Chairperson of the Search-cum-Selection

Committee of that Tribunal; and

(d) the Secretary to the Government of India in the Ministry or Department under which the Tribunal is constituted or established Ã¢â‚¬"Ã¢â‚¬¬

Member- Secretary.

(4) The Chairperson of the Committee shall have the casting vote.

(5) The Member-Secretary of the Committee shall not have any vote.

(6) The Committee shall determine its procedure for making its recommendations.

(7) Notwithstanding anything contained in any judgment, order or decree of any Court or in any law for the time being in force, the

Committee shall recommend a panel of two names for appointment to the post of Chairperson or Member, as the case may be, and the

Central Government shall take a decision on the recommendations of the Committee preferably within three months from the date on which

the Committee makes its recommendations to the Government.

(8) No appointment shall be invalid merely by reason of any vacancy or absence in the Committee.

(9) The Chairperson and Member of a Tribunal shall be eligible for re-appointment in accordance with the provisions of this section:

Provided that in making such re-appointment, preference shall be given to the service rendered by such person.

(10) The Central Government shall, on the recommendation of the Committee, remove from office, in such manner as may be provided by

rules, any Member, whoÃ¢â‚¬¬

(a) has been adjudged as an insolvent; or

(b) has been convicted of an offence which involves moral turpitude; or

(c) has become physically or mentally incapable of acting as such a Member; or

(d) has acquired such financial or other interest as is likely to affect prejudicially his functions as a Member; or

(e) has so abused his position as to render his continuance in office prejudicial to the public interest:

Provided that where a Member is proposed to be removed on any ground specified in clauses (b) to (e), he shall be informed of the charges

against him and given an opportunity of being heard in respect of those charges.

Explanation. Ã¢â‚¬"Ã¢â‚¬" For the purposes of this section, the expressions Ã¢â‚¬"Ã¢â‚¬

(i) Ã¢â‚¬Å“TribunalÃ¢â‚¬â€‹ means a Tribunal, Appellate Tribunal or Authority as specified in column (2) of the Eighth Schedule;

(ii) Ã¢â‚¬Å“ChairpersonÃ¢â‚¬â€‹ includes Chairperson, Chairman, President and Presiding Officer of a Tribunal;

(iii) Ã¢â‚¬Å“MemberÃ¢â‚¬ includes Vice-Chairman, Vice-Chairperson, Vice-President, Account Member, Administrative Member, Judicial Member,

Expert Member, Law Member, Revenue Member and Technical Member, as the case may be, of a Tribunal;

With effect from 26.05.2017.

(11) Notwithstanding anything contained in any judgment, order, or decree of any Court or any law for the time being in force, Ã¢â‚¬"Ã¢â‚¬

(i) the Chairperson of a Tribunal shall hold office for a term of four years or till he attains the age of seventy years, whichever is earlier;

(ii) the Member of a Tribunal shall hold office for a term of four years or till he attains the age of sixty-seven years, whichever is earlier:

Provided that where a Chairperson or Member is appointed between the 26th day of May, 2017 and the notified date and the term of his

office or the age of retirement specified in the order of appointment issued by the Central Government is greater than that which is specified

in this section, then, notwithstanding anything contained in this section, the term of office or age of retirement or both, as the case may be,

of the Chairperson or Member shall be as specified in his order of appointment subject to a maximum term of office of five years.

48. The first proviso of Section 184(1) provides minimum age for appointment as Chairperson or Member as 50 years. One of the issues considered in

MBA-III was the correctness of the condition imposed in the 2020 Rules that an advocate is eligible for appointment as a Member only if he has 25

years of experience. It is relevant to state that advocates were ineligible for most of the tribunals. The learned Attorney General fairly submitted in his

arguments that suitable amendment will be made to make advocates eligible, subject to their having 25 yearsÃ¢â‚¬â„¢ experience. The learned Amicus

Curiae contended in MBA-III that in order to attract competent advocates to apply for appointment as Members in tribunals, it is necessary that they

should be made eligible for appointment on the same criteria as applicable for appointment of a High Court Judge. The learned Amicus Curiae

suggested that advocates with a standing of 15 years at the bar should be made eligible for appointment as Members of tribunals. In MBA-III,

exclusion of advocates from being appointed as Members was found to be contrary to the judgment of this Court in MBA-I and MBA-II. While

recording the submission of the learned Attorney General that Rules shall be amended to make advocates eligible for appointment as Members, it was

held in MBA-III that experience at the bar for advocates to be considered for appointment as Members should be the same as is applicable for

appointment as High Court Judges, i.e., 10 years. In such view of the matter, a direction was given in MBA-III to amend the 2020 Rules to make

advocates with at least 10 years of experience at the bar eligible for appointment as Members in tribunals. The experience of advocates at the bar and

their specialization in the relevant branch of law was directed to be taken into account by the Search-cum-Selection Committee (hereinafter referred

to as SCSC) while considering their appointment. Advocates were held to be entitled for reappointment for at least one term by giving preference to

the service rendered by them in the tribunals. Thereafter, an application was filed by the Union of India for modification of the direction

aforementioned by substituting the word, Ã¢â‚¬Å“eligible for reappointmentÃ¢â‚¬ in the place of Ã¢â‚¬Å“entitled for reappointmentÃ¢â‚¬. The said request of the

Union of India was acceded to by this Court.

49. The direction given by this Court in the nature of mandamus in MBA-III is to the effect that advocates are entitled for appointment as Members,

provided they have experience of 10 years. The first proviso to Section 184 which prescribes a minimum age of 50 years is an attempt to circumvent

the direction issued in MBA-III striking down the experience requirement of 25 years at the bar for advocates to be eligible. Introduction of the first

proviso to Section 184(1) is a direct affront to the judgment of this Court in MBA-III. This Court in MBA-I and Roger Mathew (supra) underlined the

importance of recruitment of Members from the bar at a young age to ensure a longer tenure. Fixing a minimum age for recruitment of Members as

50 years would act as a deterrent for competent advocates to seek appointment. Practically, it would be difficult for an advocate appointed after

attaining the age of 50 years to resume legal practice after completion of one term, in case he is not reappointed. Security of tenure and conditions of

service are recognised as core components of independence of the judiciary. Independence of the judiciary can be sustained only when the

incumbents are assured of fair and reasonable conditions of service, which include adequate renumeration and security of tenure. Therefore, the first

proviso to Section 184(1) is in violation of the doctrine of separation of powers as the judgment of this Court in MBA-III has been frustrated by an

impermissible legislative override. Resultantly, the first proviso to Section 184 (1) is declared as unconstitutional as it is violative of Article 14 of the

Constitution. Selections conducted for appointment of Members, ITAT pursuant to the advertisement issued in 2018 should be finalized and

appointments made by considering the candidates between 35 to 50 years as also eligible.

50. The second proviso to Section 184(1) deals with the allowances and benefits payable to the Members which are to be the same as are admissible

to a Central Government officer holding a post carrying the same pay. According to Rule 15 of the 2020 Rules, Chairpersons and Members of

tribunals were entitled to House Rent Allowance at the same rate as admissible to officers with the Government of India holding Group Ã¢â‚¬ËœAÃ¢â‚¬â„¢

post carrying the same pay. The contention of the learned Amicus Curiae in MBA-III was that the majority of the tribunals are situated in Delhi and

there is scarcity of housing in Delhi. Not many Judges of the High Court are interested in accepting appointment to tribunals in view of the acute

problem of housing. An amount of Rs.75,000/- per month which was paid as House Rent Allowance (HRA) was not sufficient to get a decent

accommodation in Delhi for Chairpersons and Members of tribunals. Taking note of the serious problem of housing and the inadequate amount that

was being paid as HRA to the Members, this Court in MBA-III directed enhancement of HRA to Rs.1,25,000/- per month to the Members and

Rs.1,50,000/- per month to Chairperson or Vice-Chairperson or President of tribunals. This direction was made effective from 01.01.2021. The

learned Amicus Curiae argued that the Union of India filed an application seeking modification of the HRA directed in the judgment. The clarification

sought by the Union of India is to the effect that HRA payable to a Tribunal Member should not be a fixed amount and should, instead, be twice the

HRA payable to the holder of a subsequent rank in the Government, e.g., Secretary to the Government. Miscellaneous Application No. 111 of 2021

filed by the Union of India is pending as this Court directed the Union of India to furnish details of the accommodation available for Chairpersons and

Members of tribunals and to submit a proposal as to what amount would be reasonable towards HRA in case accommodation cannot be provided to

Members. The learned Amicus Curiae contended that the result of the amendment is that Members of tribunals working in Delhi will get Rs.60,000/-

as HRA. The second proviso to Section 184(1), read with the third proviso, is an affront to the judgment of this Court in MBA-III. By no stretch of

imagination can it be said that the said provisos are a result of curative legislation. The direction issued by this Court in MBA-III for payment of HRA

was to ensure that decent accommodation is provided to Tribunal Members. Such direction was issued to uphold independence of the judiciary and it

cannot be subject matter of legislative response. A mandamus issued by this Court cannot be reversed by the legislature as it would amount to

impermissible legislative override. Therefore, the second proviso, read with the third proviso, to Section 184(1) is declared as unconstitutional.

51. It has come to our notice that after the judgement in this Writ Petition had been reserved on 03.06.21, a notification was issued by the Ministry of

Finance (Department of Revenue) on 30.06.21 amending the 2020 Rules. By Rule 6 of the Tribunal, Appellate Tribunal and other Authorities

(Qualifications, Experience and other Conditions of Service of Members) (Amendment) Rules, 2021 (hereinafter referred to as the 2021 Amendment

Rules), the following rule was substituted for Rule 15 of the 2020 Rules:

Ã¢â‚¬Å“15. House rent allowance.- With effect from the 1st January, 2021, the Chairman, Chairperson, President, Vice Chairman, Vice

Chairperson or Vice President shall have option to avail of accommodation to be provided by the Central Government as per the rules for

the time being in force or entitled to house rent allowance subject to a limit of Rs. one lakh fifty thousand rupees per month and the

Presiding Offices and Members shall have option to avail of accommodation to be provided by the Central Government as per the rules for

the time being in force or entitled to house rent allowance subject to a limit of Rs. one lakh twenty-five thousand rupees per month.Ã¢â‚¬â€‹

According to the notification dated 30.06.2021, the 2021 Amendment Rules shall come into force on the date of their publication in the official gazette.

However, it may be noted that the Explanatory Memorandum at the end of the notification states that Rule 6 of the 2021 Amendment Rules, amending

Rule 15 of the 2020 Rules on HRA, shall be given retrospective operation with effect from 01.01.21, in order to give effect to the judgement of this

Court in MBA-III. Though we have adjudicated the validity of the second and third provisos to Section 184(1) of the Finance Act, 2017, as amended

by the Ordinance, we find that the amendment to Rule 15, made with retrospective effect from 01.01.21, is in conformity with the directions of this

Court on the subject of HRA in MBA-III. In view thereof, no further direction is required to be given with respect to HRA.

52. Rule 4(2) of the 2020 Rules pertains to the procedure to be followed by the SCSC. According to the said Rule, the SCSC should recommend two

or three names for appointment to each post. A direction was given in MBA-III to amend Rule 4(2) of the 2020 Rules to provide that the SCSC shall

recommend one person for appointment in each post in place of a panel of two or three persons for appointment to each post. One more name could

be recommended to be included in the waiting list. Relying upon the earlier judgments of this Court in MBA-I, MBA-II and Rojer Mathew (supra), the

learned Amicus Curiae had submitted during the course of the hearing in MBA-III that the procedure for appointment to the Tribunal should be clearly

outside executive control. The learned Attorney General submitted in MBA-III that the number of candidates to be recommended by SCSC can be

restricted to two instead of three. To limit the discretion of the executive after the SCSC has recommended names of selected candidates, this Court

in the interest of preserving independence of the judiciary, directed that Rule 4(2) should be read as empowering SCSC to recommend the name of

only one person to each post.

53. The learned Attorney General asserted that this Court cannot direct the legislature to make law. He relied upon the judgment in Dr. Ashwani

Kumar v. Union of India & Anr. (2020) 13 SCC 585 wherein it was held that it is beyond the competence of this Court to direct legislature to make

law. There is no quarrel with the said proposition. The learned Attorney General further asserted that the direction given by this Court in MBA-III

relating to the number of candidates to be recommended for appointment to each post can only be taken to be a suggestion. The Court, as a wing of

the State, by itself is a source of law. The law is what the Court says it is. To clarify the position relating to Article 141 vis-Ãƒ -vis Article 142, it has

been held by this Court in Ram Pravesh Singh & Ors. v. State of Bihar & Ors. (2006) 8 SCC 381 that directions given under Article 142 is not law

laid down by the Supreme Court under Article 141. Any order not preceded by any reason or consideration of any principle is an order under Article

142. Article 136 of the Constitution is a corrective jurisdiction that vests a discretion in the Supreme Court to settle the law clear and as forthrightly

forwarded in Union of India & Ors. v. Karnail Singh & Ors. (1995) 2 SCC 728, it makes the law operational to make it a binding precedent for the

future instead of keeping it vague. In short, it declares the law, as under Article 141 of the Constitution. Ã¢â‚¬Å“Declaration of lawÃ¢â‚¬ as contemplated in

Article 141 of the Constitution is the speech express or necessarily implied by the highest Court of the land. The law declared by the Supreme Court is

binding on all courts within the territory of India under Article 141, whereas, Article 142 empowers the Supreme Court to issue directions to do

complete justice. Under Article 142, the Court can go to the extent of relaxing the application of law to the parties or exempting altogether the parties

from the rigours of the law in view of the peculiar facts and circumstances of the case. [State of Punjab & Ors. v. Rafiq Masih (Whitewasher) (2014)

8 SCC 883; State v. Kalyan Singh & Ors. (2017) 7 SCC 444] Sufficient reasons were given in MBA-III to hold that executive influence should be

avoided in matters of appointments to tribunals - therefore, the direction that only one person shall be recommended to each post. The decision of this

Court in that regard is law laid down under Article 141 of the Constitution. The only way the legislature could nullify the said decision of this Court is

by curing the defect in Rule 4(2). There is no such attempt made except to repeat the provision of Rule 4(2) of the 2020 Rules in the Ordinance

amending the Finance Act, 2017. Ergo, Section 184(7) is unsustainable in law as it is an attempt to override the law laid down by this Court. Repeating

the contents of Rule 4(2) of the 2020 Rules by placing them in Section 184(7) is an indirect method of intruding into judicial sphere which is proscribed.

54. The second part of Section 184(7) provides that the Government shall take a decision regarding the recommendations made by the SCSC

preferably within a period of three months. This is in response to the direction given by this Court in MBA-III that the Government shall make

appointments to tribunals within three months from the completion of the selection and recommendation by the SCSC. Such direction was necessitated

in view of the lethargy shown by the Union of India in making appointments and filling up the posts of Chairpersons and Members of tribunals which

have been long vacant. The tribunals which are constituted as an alternative mechanism for speedy resolution of disputes have become non-functional

due to the large number of posts which are kept unfilled for a long period of time. Tribunals have become ineffective vehicles of administration of

justice, resulting in complete denial of access to justice to the litigant public. The conditions of service for appointment to the posts of Chairpersons and

Members have been mired in controversy for the past several years, thereby, adversely affecting the basic functioning of tribunals. This Court is

aghast to note that some tribunals are on the verge of closure due to the absence of Members. The direction given by this Court for expediting the

process of appointment was in the larger interest of administration of justice and to uphold the rule of law. Section 184(7) as amended by the

Ordinance permitting the Government to take a decision preferably within three months from the date of recommendation of the SCSC is invalid and

unconstitutional, as this amended provision simply seeks to negate the directions of this Court.

55. The tenure of the Chairperson and Member of a tribunal is fixed at four years by Section 184(11), notwithstanding anything contained in any

judgment, order or decree of any court. It is relevant to mention that sub-section (11) of Section 184 has been given retrospective effect from

26.05.2017. Rule 9 of 2020 Rules had specified the term of appointment of the Chairperson or Member of the Tribunal as four years. The learned

Amicus Curiae while making his submissions in MBA-III had insisted that the Chairperson and Members of a tribunal should have a minimum term of

five years by placing reliance on the judgment of this Court in S.P. Sampath (supra), MBA-I and Rojer Mathew (supra). The stand taken by him was

that a short tenure would be a disincentive for competent persons to seek appointment as Members of tribunals. The learned Attorney General

submitted that the term of four years is subject to reappointment. He contended that advocates who are appointed at an early age can get more than

one extension and continue till they reach the age of superannuation. After perusing the law laid down by this Court in MBA-I and Rojer Mathew

(supra) which held that a short stint is anti-merit, we directed the modification of tenure in Rules 9(1) and 9(2) as five years in respect of Chairpersons

and Members of tribunals in MBA-III. This Court declared in para 53(iv) that the Chairperson, Vice-Chairperson and the Members of the tribunals

shall hold office for a term of five years and shall be eligible for reappointment. The insertion of Section 184(11) prescribing a term of four years for

the Chairpersons and Members of tribunals by giving retrospective effect to the provision from 26.05.2017 is clearly an attempt to override the

declaration of law by this Court under Article 141 in MBA-III. Therefore, clauses (i) and (ii) of Section 184(11) are declared as void and

unconstitutional.

56. The proviso to Section 184(11) refers to appointments that were made to the posts of Chairperson or Members between 26.05.2017 and the

notified date, i.e., 04.04.2021. The proviso lays down that if the tenure of office or age of retirement specified in the order of appointment issued by

the Government is greater than what is specified in Section 184(11), the term of office or the age of retirement of the Chairperson or Members shall

be as specified in the order of appointment subject to a maximum term of office of five years. In other words, the term of office of Chairperson and

Members of tribunals who were appointed between 26.05.2017 and 04.04.2021 shall be five years even though the order of appointment issued by the

Government has a higher term of office or age of retirement which may involve the term of office being more than 5 years in practice. It is necessary

at this stage to deal with the validity of retrospective effect given to sub-section (11) of Section 184. The learned Amicus Curiae canvassed a

submission that Sections 184(1) to (10) are prospective in operation and Section 184(11) is given retrospective effect from 26.05.2017, thereby leading

to an anomalous situation. He submitted that sub-section (11) is made with the object of reversing the interim orders passed by this Court in Kudrat

Sandhu v. Union of India (supra). He stated that the terms and conditions of appointments to be made to the Tribunals / Appellate Tribunals shall be in

terms of the respective statutes in force, before the enactment of the Finance Bill, 2017, according to para 224 of Rojer Mathew (supra). Mr. Balbir

Singh, learned Additional Solicitor General, submitted that retrospectivity given to sub-section (11) of Section 184 is a permissible legislative override of

the judgment of this Court in MBA-III. The 2020 Rules were held to be prospective in MBA-III on two grounds - a) it was clear from the Notification

dated 12.02.2020 that there was no intention on the part of the Government of India to make the 2020 Rules retrospective; b) subordinate legislation

cannot be given prospective effect unless the parent statute specifically provided the same. It is understood that while inserting sub-section (11) in

Section 184 in the Finance Act, 2017 and giving it retrospective effect from 26.05.2017, the Ordinance has attempted to cure the defect as was

pointed out by this Court in terms of retrospective application while considering the 2020 Rules. However, the implications are not relevant for clauses

(i) and (ii) of Section 184(11) which are declared as void and unconstitutional for the reasons mentioned above.

57. Insofar as the proviso to Section 184(11) is concerned, the Ordinance sets the maximum tenure at five years even with respect to the appointment

orders passed between 26.05.2017 and 04.04.2021 provide for a higher tenure. In the process, interim directions given by this Court in Kudrat Sandhu

(supra) are also nullified. It would be relevant to refer to the directions issued by this Court in Kudrat Sandhu (supra) on 09.02.2018. After taking the

consent of the learned Attorney General and making modifications incorporating his suggestions, this Court held that all selections to the post of

Chairperson/ Chairman, Judicial/ Administrative Members shall be for a period as provided in the Act and the Rules in respect of all tribunals. On

16.07.2018, this Court directed that persons selected as Members of ITAT can continue till the age of 62 years and persons who were holding the

post of President till 65 years. By an order dated 21.08.2018, this Court clarified that a person selected as Member, CESTAT shall continue till the age

of 62 years while a person holding the post of President can continue till the age of 65 years. Though, there is nothing wrong with the proviso to

Section 184(11) being given retrospective effect, the appointments made pursuant to the interim directions passed by this Court cannot be interfered

with. This Court in Virender Singh Hooda (supra) upheld the retrospectivity of the legislation which had been challenged but the appointment of the

petitioners therein pursuant to a direction of the Court were saved. It was held that the law does not permit the legislature to take back what has been

granted in the implementation of the CourtÃ¢â‚¬â„¢s decision and such a course is impermissible. Similarly, in S.R. Bhagwat (supra), it was declared that a

mandamus against the respondent-State giving financial benefits to the petitioners therein cannot be nullified by a legislation. It is also relevant to point

out that even interim orders passed by this Court cannot be overruled by a legislative act, as discussed above. While making it clear that the

appointments that are made to the CESTAT on the basis of interim orders passed by this Court shall be governed by the relevant statute and the rules

framed thereunder, as they existed prior to the Finance Act, 2017, we uphold the retrospectivity given to the proviso to Section 184 (11). To clarify

further, all appointments after 04.04.2021 shall be governed by the Ordinance, as modified by the directions contained herein.

58. To conclude, the first proviso and the second proviso, read with the third proviso, to Section 184 overriding the judgment of this Court in MBA-III

in respect of fixing 50 years as minimum age for appointment and payment of HRA, Section 184(7) relating to recommendation of two names for

each post by the SCSC and further, requiring the decision to be taken by the Government preferably within three months are declared to be

unconstitutional. Section 184(11) prescribing tenure of four years is contrary to the principles of separation of powers, independence of judiciary, rule

of law and Article 14 of the Constitution of India. Though, we have upheld the proviso to Section 184(11), the appointments made to the CESTAT

pursuant to the interim orders passed by this Court shall be governed by the relevant statute and the rules framed thereunder that existed prior to

26.05.2017. We have already taken notice of the notification dated 30.06.21 by way of which Rule 15 of the 2020 Rules dealing with HRA has been

amended in conformity with our directions in MBA-III.

Peroration

59. The Petitioner continues its relentless struggle in its endeavour to make tribunals effective avenues of administration of justice. The endeavour of

the Petitioner is to extricate the tribunals from the clutches of the executive in the interest of independence of judiciary. Security of tenure, adequate

remuneration and other conditions of service are necessary to ensure that Members of tribunals would feel secure during their tenure. The judgment in

MBA-III was passed after a detailed dialogue with the learned Attorney General. Existence of large number of vacancies of Members and

Chairpersons and the inordinate delay caused in filling them up has resulted in emasculation of the tribunals. The main reason for tribunalisation, which

is to provide speedy justice, is not achieved as tribunals are wilting under the unbearable weight of the exploding docket. Undoubtedly, the legislature is

free to exercise its power to make laws and the executive is the best judge to decide policy matters. However, it is high time that a serious effort is

made by all concerned to ensure that all the vacancies in the tribunals are filled up without delay. Access to justice and confidence of the litigant public

in impartial justice being administered by tribunals need to be restored.

60. The Writ Petition is disposed of accordingly.

Hemant Gupta, J

1. I have gone through the detailed judgment authored by Justice L. Nageswara Rao as also separate but concurring judgment of Justice Ravindra

Bhat, but I am unable to persuade myself to agree with the views expressed therein except to the limited extent that part of Section 187(7) of the

Tribunals Reforms (Rationalisation and Conditions of Service) Ordinance, 2021 [For short, the Ã¢â‚¬Ëœ Ordinance Ã¢â‚¬â„¢] that the Search and Selection

Committee shall recommend two names for a post and that the tenure of members including Chairperson etc. shall be four years in terms of Clauses

(i) and (ii) of Section 184 (11) of the Ordinance is illegal since the issues of constitution of panel and tenure have already been decided in MBA-III

and that without removing such defect, the Ordinance could not be enacted.

2. Before I advert to the grounds of challenge, some of well-established and settled principles of the applicability of the principles of interpretation

need to be recapitulated.

(i) The power of Legislature is to enact law and the power of Judiciary of that of judicial review of the statutory enactments .

3. The three organs of the State i.e., Legislature, Judiciary and Executive have separate and distinct roles and functions as provided in the

Constitution. All the institutions must act within their own jurisdiction and not trespass into the jurisdiction of others. By segregating the powers and

functions of the three institutions, the Constitution ensures such a structure where the institutions function as per their own institutional strength.

Secondly, it also creates a system of checks and balances as the Constitution provides a degree of latitude for interference by each branch into the

functions and tasks performed by another branch [Dr. Ashwani Kumar v. Union of India & Anr., (2020) 13 SCC 585 (Para 10)].

4. The Constitution does not permit the courts to direct, advise or sermonize other organs of the State in the spheres reserved for them, provided the

legislature or executive does not transgress its constitutional limits or statutory conditions. Independence and adherence to constitutional accountability

and limits while exercising the power of judicial review gives constitutional legitimacy to the court decisions. This is the essence of the power and

function of judicial review that strengthens and promotes the rule of law [Ibid (Para 13)].

5. It is also to be noted that the application of law by the Judges is not synonymous with the enactment of law by the legislature. Judges have the

power to spell out how precisely the statute would apply in a particular case. In this manner, they complete the law formulated by the legislature by

applying it. This power of interpretation or the power of judicial review is exercised post the enactment of law, which is then made subject-matter of

interpretation or challenge before the courts. [Ibid (Para 25)]

6. This Court has observed that if a law is enacted by the Parliament or Legislature, even if it is assumably contrary to the directions or guidelines

issued by the Court, it cannot be struck down by reason of such directions/guidelines issued by the Court; it can be struck down only if it violates the

fundamental rights or the right to equality under Article 14 of the Constitution [Ibid (Para 29)].

7. A seven Judge Bench of this Court [P. Ramachandra Rao v. State of Karnataka, (2002) 4 SCC 578] held that the primary function of the judiciary

is to interpret the law. It may lay down principles, guidelines and exhibit creativity in the field left open and unoccupied by legislation [Ibid (Para 25)].

The Court while interpreting Articles 32, 21, 141 and 142 of the Constitution held that prescribing periods at which criminal trial would terminate

resulting in acquittal or discharge of the accused or making such directions applicable to all cases in present or in future would amount to judicial law

making and cannot be done by judicial directives. The Courts can declare law, interpret law, remove obvious lacunae and fill up the gaps but they

cannot entrench upon in the field of legislation [Ibid (Para 27)]. The bars of limitation were deleted by this Court on two grounds, first, it amounts to

judicial legislation which was not permissible and secondly, it runs counter to the doctrine of binding precedents [Ibid (Para 33)].

8. The Constitution Bench of this Court [A.K. Roy v. Union of India & Ors., (1982) 1 SCC 271 (Para 51)] held that a writ of mandamus cannot be

issued to bring Section 3 of the 44th Constitutional Amendment Act in force. It was held that the Parliament having left to the unfettered judgment of

the Central Government, the question as regards the time for bringing the provisions of the 44th Amendment into force, it was not for the court to

compel the Government to do what according to the mandate of the Parliament lies in its discretion to do so when it considered it opportune to do it.

Since the Parliament has left the matter to the judgment of the Central Government without prescribing any objective norms, it makes it difficult for

the Courts to substitute their own judgment for that of Government on the question whether Section 3 of the 44th Amendment should be brought into

force.

9. This Court [Mangalam Organics Limited v. Union of India, (2017) 7 SCC 221 (Para 36)] held that the Court cannot direct the legislature to enact a

particular law when an executive authority exercises a legislative power by way of subordinate legislation pursuant to the delegated authority of a

legislature, such executive authority cannot be asked to enact the law which it has been empowered to do under the delegated legislative authority.

10. In another Constitution Bench judgment of this Court [Kalpana Mehta & Ors. v. Union of India & Ors., (2018) 7 SCC 1 (Para 42)], it was held

that the duty of judicial review bestowed upon the judiciary is not unfettered and it comes within the ambit of judicial restraint. The Parliament and

Legislative Assemblies exercise sovereign power to enact law and no outside power or authority can issue a direction to enact a particular kind of

legislation.

11. In a separate but concurring judgment in Kalpana Mehta authored by D.Y. Chandrachud, J., the Court held as under:

Ã¢â‚¬Å“255. Parliament and the State Legislatures legislate. The executive frames policies and administers the law. The judiciary decides and adjudicates

upon disputes in the course of which facts are proved and the law is applied. The distinction between the legislative function and judicial functions is

enhanced by the basic structure doctrine. The legislature is constitutionally entrusted with the power to legislate. Courts are not entrusted with the

power to enact law. Yet, in a constitutional democracy which is founded on the supremacy of the Constitution, it is an accepted principle of

jurisprudence that the judiciary has the authority to test the validity of legislation. Legislation can be invalidated where the enacting legislature lacks

legislative competence or where there is a violation of fundamental rights. A law which is constitutionally ultra vires can be declared to be so in the

exercise of the power of judicial review. Judicial review is indeed also a part of the basic features of the Constitution. Entrustment to the judiciary of

the power to test the validity of law is an established constitutional principle which co-exists with the separation of powers. Where a law is held to be

ultra vires there is no breach of parliamentary privileges for the simple reason that all institutions created by the Constitution are subject to

constitutional limitations. The legislature, it is well settled, cannot simply declare that the judgment of a court is invalid or that it stands nullified. If the

legislature were permitted to do so, it would travel beyond the boundaries of constitutional entrustment. While the separation of powers prevents the

legislature from issuing a mere declaration that a judgment is erroneous or invalid, the law-making body is entitled to enact a law which remedies the

defects which have been pointed out by the court. Enactment of a law which takes away the basis of the judgment (as opposed to merely invalidating

it) is permissible and does not constitute a violation of the separation doctrine. That indeed is the basis on which validating legislation is permitted.Ã¢â‚¬â€‹

12. The lack of binding nature of the guidelines on the legislature is also evident from the fact that even though directions that are mandatory in nature

may be issued within the ambit of Article 142 of the Constitution, but the same cannot be enforced against the legislature as the legislators have

absolute and unfettered freedom in terms of Article 194(2) in respect of State Legislatures, which is pari materia with Article 105(2) relating to

Parliament. The seven Judges Bench of this Court [Powers, Privileges and Immunities of State Legislatures, AIR 1965 SC 745] in the celebrated case

of controversy between the Uttar Pradesh Assembly and the High Court held as under:

Ã¢â‚¬Å“32. Having conferred freedom of speech on the legislators, clause (2) emphasises the fact that the said freedom is intended to be absolute and

unfettered. Similar freedom is guaranteed to the legislators in respect of the votes they may give in the legislature or any committee thereof. In other

words, even if a legislator exercises his right of freedom of speech in violation, say, of Article 211, he would not be liable for any action in any court.

Similarly, if the legislator by his speech or vote, is alleged to have violated any of the fundamental rights guaranteed by Part III of the Constitution in

the Legislative Assembly, he would not be answerable for the said contravention in any court. If the impugned speech amounts to libel or becomes

actionable or indictable under any other provision of the law, immunity has been conferred on him from any action in any court by this clause. He may

be answerable to the House for such a speech and the Speaker may take appropriate action against him in respect of it; but that is another matter. It

is plain that the Constitution-makers attached so much importance to the necessity of absolute freedom in debates within the legislative chambers that

they thought it necessary to confer complete immunity on the legislators from any action in any court in respect of their speeches in the legislative

chambers in the wide terms prescribed by clause (2). Thus, clause (1) confers freedom of speech on the legislators within the legislative chamber and

clause (2) makes it plain that the freedom is literally absolute and unfettered.

40. Our legislatures have undoubtedly plenary powers, but these powers are controlled by the basic concepts of the written Constitution itself and can

be exercised within the legislative fields allotted to their jurisdiction by the three Lists under the Seventh Schedule; but beyond the Lists, the

legislatures cannot travel. They can no doubt exercise their plenary legislative authority and discharge their legislative functions by virtue of the

powers conferred on them by the relevant provisions of the Constitution; but the basis of the power is the Constitution itself. Besides, the legislative

supremacy of our legislatures including the Parliament is normally controlled by the provisions contained in Part III of the Constitution. If the

legislatures step beyond the legislative fields assigned to them, or acting within their respective fields, they trespass on the fundamental rights of the

citizens in a manner not justified by the relevant articles dealing with the said fundamental rights, their legislative actions are liable to be struck down

by courts in India. Therefore, it is necessary to remember that though our legislatures have plenary powers, they function within the limits prescribed

by the material and relevant provisions of the Constitution.Ã¢â‚¬â€‹

13. A conspectus of the above judgments, inter alia, among many others, is that the judiciary in exercise of power of judicial review can strike down

any legislation which violates fundamental rights or if it is beyond the legislative competence but the courts cannot direct the legislature to frame or

enact a law and in a particular manner. The law declared by the Supreme Court is binding on all Courts in India in terms of Article 141 of the

Constitution. The directions issued under Article 142 of the Constitution, are binding on every Court in terms of Article 141 of the Constitution. The

legislature cannot be said to be Court within the meaning of Article 141 of the Constitution by any stretch of imagination. Article 144 of the

Constitution mandates, civil and judicial authorities in India shall act in aid of the Supreme Court meaning thereby executive and judicial authorities

shall act in aid of the Supreme Court. The legislature is neither civil or judicial authority who is mandated by the Constitution to act in the aid of Court.

The legislature is supreme so as to enact a law falling within its legislative competence. The directions of the court cannot compel the legislature to

frame law in that particular manner only. The legislature while enacting laws can legislate in a manner which is not in accordance with the directions

issued by the Court to the legislature, even if the Court has specially chosen to do so. The directions of this Court stop outside the four walls of

legislature. The judiciary will step in only after a law is enacted to test the legality of a statue on the known principles of judicial review. The Judiciary

cannot and should not usurp the powers vested with legislature. The Judiciary cannot legislate in the scheme of the constitution as propounded by

many judgments including larger Bench Judgments, which are binding on the smaller strength benches. The directions of this Court in MBA-III are

encroaching upon the field reserved for legislature.

(ii) Whether a judgment has to be read in the context in which it was given and cannot be read as a statute, inter alia, in view of the

principles that the Court while interpreting a provision cannot generally add word to a statute in view of doctrine of Casus Omissus .

14. A Constitution Bench [Padma Sundara Rao (Dead) & Ors. v. State of T.N. & Ors., (2002) 3 SCC 533 (Para 9)] of this Court has held that

Courts should not place reliance on decisions without discussing as to how the factual situation of the matter fits in with the factual situation of the

decision on which reliance is placed. There is always peril in treating the words of a speech or judgment as though they are words in a legislative

enactment, and it is to be remembered that judicial utterances are made in the setting of the facts of a particular case. This Court further held as

under:

Ã¢â‚¬Å“12. The rival pleas regarding rewriting of statute and casus omissus need careful consideration. It is well-settled principle in law that the court

cannot read anything into a statutory provision which is plain and unambiguous. A statute is an edict of the legislature. The language employed in a

statute is the determinative factor of legislative intent. The first and primary rule of construction is that the intention of the legislation must be found in

the words used by the legislature itself. The question is not what may be supposed and has been intended but what has been said. Ã¢â‚¬Å“Statutes should

be construed, not as theorems of EuclidÃ¢â‚¬, Judge Learned Hand said, Ã¢â‚¬Å“but words must be construed with some imagination of the purposes which

lie behind themÃ¢â‚¬. (See Lenigh Valley Coal Co. v. Yensavage [218 FR 547] .) The view was reiterated in Union of India v. Filip Tiago De Gama of

Vedem Vasco De Gama [(1990) 1 SCC 277 : AIR 1990 SC 981] .

xx xx xx

14. While interpreting a provision the court only interprets the law and cannot legislate it. If a provision of law is misused and subjected to the abuse of

process of law, it is for the legislature to amend, modify or repeal it, if deemed necessary. (See Rishabh Agro Industries Ltd. v. P.N.B. Capital

Services Ltd. [(2000) 5 SCC 515]) The legislative casus omissus cannot be supplied by judicial interpretative processÃ¢â‚¬Â¦Ã¢â‚¬Â¦Ã¢â‚¬â€‹

15. This Court [State of Orissa & Ors. v. Md. Illiyas, (2006) 1 SCC 275 (Para 12)] held that according to the well-settled theory of precedents, every

decision contains three basic postulates: (i) findings of material facts, direct and inferential. An inferential finding of facts is the inference which the

Judge draws from the direct, or perceptible facts; (ii) statements of the principles of law applicable to the legal problems disclosed by the facts; and

(iii) judgment based on the combined effect of the above. A decision is an authority for what it actually decides. What is of the essence in a decision is

its ratio and not every observation found therein, nor what logically flows from the various observations made in the judgment. The said view has been

relied upon by the Constitution Bench of this Court [Natural Resources Allocation, in Re, Special Reference No. 1 of 2012].

16. This Court [Union of India v. Amrit Lal Manchanda & Anr., (2004) 3 SCC 75 (Para 15)] also held that the observations of courts are neither to be

read as Euclid's theorems nor as provisions of the statute and that too taken out of their context. The observations must be read in the context in

which they appear to have been stated.

17. This Court [Som Mittal v. Government of Karnataka, (2008) 3 SCC 574 (Para 9)] has observed that judgments are not to be construed as statutes.

The words or phrases in judgments are not to be interpreted like provisions of a statute. The words in a judgment should be read and understood

contextually and not intended to be taken literally. Such interpretation has been followed by a two Judge Bench of this Court [Arasmeta Captive

Power Company Private Limited & Anr. v. Lafarge India Private Limited, (2013) 15 SCC 414 (Para 32)] wherein it was held that the ratio of any

decision must be understood in the background of the facts of that case.

18. In another recent judgment [Shanti Bhushan v. Supreme Court of India & Anr., (2018) 8 SCC 396], it was held that the ratio of a judgment is what

it decides and not what logically follows therefrom. The Court held as under:

Ã¢â‚¬Å“31. It is trite that ratio of a judgment is what it decides and not what logically follows therefrom. The observations in the Three Judges cases

[Supreme Court Advocates-on- Record Assn. v. Union of India, (1993) 4 SCC 441] , [S.P. Gupta v. Union of India, 1981 Supp SCC 87] , [Special

Reference No. 1 of 1998, In re, (1998) 7 SCC 739] are to be read in the context in which they are rendered. Once that is kept in mind, we arrive at a

conclusion that the ratio of those judgments cannot be extended to read the expression Ã¢â‚¬Å“Chief JusticeÃ¢â‚¬, wherever it occurs, to mean the

Ã¢â‚¬Å“CollegiumÃ¢â‚¬â€‹ of the senior Judges.Ã¢â‚¬â€‹

19. This Court [M.C. Mehta v. Kamal Nath & Ors., (2000) 6 SCC 213] observed that the plenary powers of this Court under Article 142 of the

Constitution are inherent in the Court and are Ã¢â‚¬Å“complementaryÃ¢â‚¬â€‹ to those powers which are specifically conferred on the Court by various statutes.

The powers conferred on the Court by Article 142 are curative in nature, they cannot be construed as powers which authorize the Court to ignore the

substantive rights of a litigant. This power cannot be used to Ã¢â‚¬Å“supplantÃ¢â‚¬ substantive law applicable to the case or cause under consideration of the

Court. Article 142, even with the width of its amplitude, cannot be used to build a new edifice where none existed earlier, by ignoring express statutory

provisions dealing with a subject and thereby achieve something indirectly which cannot be achieved directly. The Court held as under:

Ã¢â‚¬Å“19. Ã¢â‚¬Â¦Article 142, even with the width of its amplitude, cannot be used to build a new edifice where none existed earlier, by ignoring express

statutory provisions dealing with a subject and thereby achieve something indirectly which cannot be achieved directly.Ã¢â‚¬â€‹

20. Thus, the Court will not direct to the State or Union to enact any particular law, or amend/ issue any notification for amendment of any statutory

Rule or even to direct an Act to be enforced, when the legislature has conferred such power on the executive. The directions of this Court in MBA-

III were issued in the peculiar facts to make the Tribunal functional at the earliest rather than mandating legislature to amend the law in a particular

manner. The legislature has a right to enact law, which may not be necessarily in terms of the directions of this Court. Such law when enacted by

Parliament or the State Legislature, even if contrary to the directions or guidelines issued by the Court, cannot be struck down for the said reason. The

legislation can be struck down if the basis of the provision interpreted by the Court is not altered or if it violates the fundamental rights or the right to

equality under Article 14 of the Constitution.

21. The questions of law raised in MBA-III were in respect of separation of powers and independence of judiciary in the matter of constitution of

Search and Selection Committee; appointment of persons without judicial experience as Judicial Members; failure to provide proper technical

specialized expertise; failure to provide for adequate tenure of members; exclusion of advocates for being appointed as members of tribunals;

continuing role of the parent department in Search and Selection Committee; the preliminary inquiry by the Central Government for removal of the

members is invalid and the ExecutiveÃ¢â‚¬â„¢s continuing administrative and financial control over the tribunals.

22. The directions of this Court which are at variance with the Ordinance are as follows:

Ã¢â‚¬Å“53. The upshot of the above discussion leads this court to issue the following directions:

(i) xxx xxx

(iii) Rule 4(2) of the 2020 Rules shall be amended to provide that the Search-cum-Selection Committee shall recommend the name of one person for

appointment to each post instead of a panel of two or three persons for appointment to each post. Another name may be recommended to be included

in the waiting list.

(iv) The Chairpersons, Vice-Chairpersons and the members of the Tribunal shall hold office for a term of five years and shall be eligible for

reappointment. Rule 9(2) of the 2020 Rules shall be amended to provide that the Vice-Chairman, Vice-Chairperson and Vice President and other

members shall hold office till they attain the age of sixty-seven years.

(v) The Union of India shall make serious efforts to provide suitable housing to the Chairman or Chairperson or President and other members of the

Tribunals. If providing housing is not possible, the Union of India shall pay the Chairman or Chairperson or President and Vice-Chairman, Vice-

Chairperson, Vice President of the Tribunals an amount of Rs. 1,50,000/- per month as house rent allowance and Rs. 1,25,000/- per month for other

members of the Tribunals. This direction shall be effective from 01.01.2021.

(vi) xxx xxx

(ix) The Union of India shall make appointments to Tribunals within three months from the date on which the Search-cum-Selection Committee

completes the selection process and makes its recommendations.

(x) The 2020 Rules shall have prospective effect and will be applicable from 12.02.2020, as per Rule 1(2) of the 2020 Rules.

(xi) Appointments made prior to the 2017 Rules are governed by the parent Acts and Rules which established the concerned Tribunals. In view of the

interim orders passed by the Court in Rojer Mathew (supra), appointments made during the pendency of Rojer Mathew (supra) were also governed

by the parent Acts and Rules. Any appointments that were made after the 2020 Rules came into force i.e. on or after 12.02.2020 shall be governed by

the 2020 Rules subject to the modifications directed in the preceding paragraphs of this judgment.

(xii) xxx xxx

(xiv) The terms and conditions relating to salary, benefits, allowances, house rent allowance etc. shall be in accordance with the terms indicated in,

and directed by this judgment.

(xv) The Chairpersons, Vice Chairpersons and members of the Tribunals appointed prior to 12.02.2020 shall be governed by the parent statutes and

Rules as per which they were appointed. The 2020 Rules shall be applicable with the modifications directed in the preceding paragraphs to those who

were appointed after 12.02.2020. While reserving the matter for judgment on 09.10.2020, we extended the term of the Chairpersons, Vice-

Chairpersons and members of the Tribunals till 31.12.2020. In view of the final judgment on the 2020 Rules, the retirements of the Chairpersons, Vice-

Chairpersons and the members of the Tribunals shall be in accordance with the applicable Rules as mentioned above.Ã¢â‚¬‹

23. The arguments were concluded on 3rd June 2021 but before we could finalize our views, the Tribunal, Appellate Tribunal and other Authorities

(Qualifications, Experience and other Conditions of Service of Members) (Amendment) Rules, 2021 stands notified on 30th June 2021. The Search

and Selection Committee as ordered by this Court in MBA-III, the Advocate being eligible for appointment in certain Tribunal and option to pay House

Rent Allowance in terms of the directions of this Court in MBA-III stands incorporated in such Rules. The questions raised now have to be examined

in the light of amended Rules.

24. The judgment authored by Justice L. Nageswara Rao has held as under:

Ã¢â‚¬Å“43. The permissibility of a legislative override in this country should be in accordance with the principles laid down by this Court in the

aforementioned as well as other judgments, which have been culled out as under:

a) The effect of the judgments of the Court can be nullified by a legislative act removing the basis of the judgment. Such law can be retrospective.

Retrospective amendment should be reasonable and not arbitrary and must not be violative of the fundamental rights guaranteed under the

Constitution. (Lohia Machines Ltd. & Anr. v. Union of India & Ors. ((1985) 2 SCC 1987).

b) The test for determining the validity of a validating legislation is that the judgment pointing out the defect would not have been passed, if the altered

position as sought to be brought in by the validating statute existed before the Court at the time of rendering its judgment. In other words, the defect

pointed out should have been cured such that the basis of the judgment pointing out the defect is removed.

c) Nullification of mandamus by an enactment would be impermissible legislative exercise (See: S.R. Bhagwat & Ors. v. State of Mysore, ((1995) 6

SCC 16). Even interim directions cannot be reversed by a legislative veto (See: Cauvery Water Disputes Tribunal, 1993 Supp (1) SCC 96) and

Medical Council of India v. State of Kerala & Ors., ((2019) 13 SCC 185).

d) Transgression of constitutional limitations and intrusion into the judicial power by the legislature is violative of the principle of separation of powers,

the rule of law and of Article 14 of the Constitution of India.Ã¢â‚¬â€‹

25. I have my reservation with respect to the aforementioned conclusions (c) and (d). In Cauvery Water Disputes Tribunal, the State of Karnataka

promulgated Karnataka Cauvery Basin Irrigation Protection Ordinance, 1991 on 25.7.1991. In pursuance of the order passed by this Court in a writ

petition, the Tribunal by way of an interim order directed the State of Karnataka to release water from its reservoirs to ensure 205 TMC is available in

Tamil NaduÃ¢â‚¬â„¢s Mettur reservoir in a year from June to May vide its order dated 25.6.1991. It is thereafter the Ordinance in dispute was

promulgated. It is the said interim order which was sought to be nullified by enactment of the Ordinance, later substituted by an Act by the State of

Karnataka. This Court held as under:

Ã¢â‚¬Å“73. The Ordinance is unconstitutional because it affects the jurisdiction of the Tribunal appointed under the Central Act, viz., the Inter- State

Water Disputes Act which legislation has been made under Article 262 of the Constitution. As has been pointed out above, while analysing the

provisions of the Ordinance, its obvious purpose is to nullify the effect of the interim order passed by the Tribunal on June 25, 1991. The Ordinance

makes no secret of the said fact and the written statement filed and the submissions made on behalf of the State of Karnataka show that since

according to the State of Karnataka the Tribunal has no power to pass any interim order or grant any interim relief as it has done by the order of June

25, 1991, the order is without jurisdiction and, therefore, void ab initio. This being so, it is not a decision, according to Karnataka, within the meaning of

Section 6 and not binding on it and in order to protect itself against the possible effects of the said order, the Ordinance has been issued. The State of

Karnataka has thus arrogated to itself the power to decide unilaterally whether the Tribunal has jurisdiction to pass the interim order or not and

whether the order is binding on it or not. Secondly, the State has also presumed that till a final order is passed by the Tribunal, the State has the power

to appropriate the waters of the river Cauvery to itself unmindful of and unconcerned with the consequences of such action on the lower riparian

StatesÃ¢â‚¬Â¦Ã¢â‚¬Â¦Ã¢â‚¬Â¦.. To the extent that the Ordinance interferes with the decision of this Court and of the Tribunal appointed under the Central legislation,

it is clearly unconstitutional being not only in direct conflict with the provisions of Article 262 of the Constitution under which the said enactment is

made but being also in conflict with the judicial power of the State.Ã¢â‚¬â€‹ (Emphasis Supplied)

26. The judgment of this Court in Medical Council of India was again to nullify the judgment of this Court where this Court had struck down the

admission of 180 students in Kannur Medical College and Karuna Medical College in the State of Kerala. This Court held as under:

Ã¢â‚¬Å“23. What has been done by the impugned Ordinance by the State Government is clearly entrenching upon the field of judicial review and it was

obviously misadventure resorted to. In our considered opinion, it was not at all permissible to the State Government to promulgate the

Ordinance/legislate in the matter. Not only the judgment of the court is nullified and the arbitrariness committed in admissions was glaring, and the

decision of the High Court of Kerala which was affirmed by this Court with respect to applications to be entertained if they were online applications

has been undone. It was clearly an act of nullifying judgment and is violative of judicial powers which vested in the judiciary. It was not open for the

State Government to nullify the judgment/orders passed by the Kerala High Court or by this Court. It was not a case of removal of a defect in existing

law. Various Constitution Bench decisions of this Court have settled the principles of law governing the field. It passes comprehension how the State

Government has promulgated the Ordinance in questionÃ¢â‚¬â€‹.

(Emphasis Supplied)

27. In S.R. Bhagwat, the petitioners were senior in the final seniority list but their juniors got promoted on the basis of higher ranking in the provisional

seniority list which was earlier operative. The writ petitions were allowed wherein the petitioners were directed to be considered for promotion. In

implementation of the said judgment, the State granted deemed dates of promotions but denied the consequential monetary benefits. The petitioners

filed contempt petitions before the High Court. It was at that stage that an Ordinance was promulgated whereby payment of actual financial benefits

was sought to be taken away. The said judgment is clearly not applicable to the facts of present case as the defect was not even attempted to be

cured. The legislative action was to deny financial benefits arising out of a judgment, which had attained finality. In the present case, I am of the

opinion that except two aspects that are contained in Rules 4(2) and 9(2) of the 2020 Rules, rest of directions were dehors the legality or illegality of

the Rules with an idea of making Tribunals being made functional at the earliest.

28. Therefore, three judgments referred hereinabove have to be read in the context of the facts and the issues raised therein. In fact, none of the

judgments was to the effect that whatever are the directions of this Court to enact law, it is binding on the legislature. The three judgments arise out of

facts, wherein, the defect was not even attempted to be cured but simpliciter, the judgment was sought to be nullified.

29. In respect of conclusion (d), though transgression of constitutional limitations and intrusion into the judicial power by the legislature is violative of

the principle of separation of powers, the rule of law and of Article 14 of the Constitution of India, but it is equally true that judiciary in exercise of

power of judicial review cannot direct legislature to frame any law in a particular manner.

Legality and validity of first proviso to Section 184(1) of the Ordinance

30. The said proviso to Section 184(1) of the Ordinance reads as below:

Ã¢â‚¬Å“Provided that a person who has not completed the age of fifty years shall not be eligible for appointment as a Chairperson or MemberÃ¢â‚¬â€‹

31. I am unable to agree to the opinion that the first proviso to Section 184 prescribing a minimum age of fifty years is an attempt to circumvent the

direction issued in MBA-III. The condition of eligibility for appointment as a Judge of a High Court was kept in view while considering the eligibility of

advocates as members of Tribunals. However, the Memorandum of Procedure for appointment as judges of the High Court finalized by this Court and

forwarded to the Central Government in March, 2017 was that a person shall not be eligible to be considered for appointment as Judge of a High

Court against Bar quota unless he has completed forty-five years of age on the date of recommendation by the High Court Collegium. Though, in

terms of Article 217 of the Constitution, a candidate becomes eligible for appointment after 10 years of practice as an Advocate. Thus, an Advocate

would be eligible for appointment as judge of the High Court around the age of 35 years. The Memorandum of Procedure adopted by the Collegium of

this Court prescribed forty-five years of age as the minimum age. I find that eligibility to seek appointment is not solely dependent upon qualification of

a candidate but experience and suitability, likely term which a candidate may have are necessary considerations. The relevant part from the

memorandum of the collegium is reproduced as under:

Ã¢â‚¬Å“17. A person shall not be eligible to be considered for appointment as Judge of a High Court against Bar quota, unless he has completed 45 years

of age on the date of recommendation by the High Court Collegium.Ã¢â‚¬â€‹

32. In terms of the Constitution read with the Memorandum of Procedure adopted by this Court, an advocate would have maximum tenure of 17 years

as a Judge of the High Court, may be another three years as Judge of this Court. On the other hand, an advocate appointed as member of a Tribunal

can have a tenure of 17 years, even if 50 is the minimum age for appointment. The tenure of such member is up to the age of 67 years with the

possibility of being appointed as the Chairperson. This is not to compare the status of a High Court Judge with that of a member of a Tribunal. The

members would be appointed on the basis of recommendation of the high-powered Search and Selection Committee having judicial dominance. If a

member is discharging his functions legally, there is no need to bear any apprehension about his not being re-appointed. The process of re-appointment

is again with the High-Powered Search and Selection Committee with judicial dominance. A provision in the statute cannot be found to be untenable

merely for the reason that there is a possibility of not being reappointed.

33. The advocates were not eligible for appointment under 2020 Rules. Therefore, there was no condition of age of eligibility of such candidates. It

may be noted that though this Court discussed the age of the candidates eligible for appointment to be Ã¢â‚¬Å“around 45 yearsÃ¢â‚¬ in para 44, but there was

no particular direction qua age.

34. The discussions in the judgment are not to be considered as directions. There is background in which the ultimate directions are issued. Since no

directions were issued in respect of eligibility conditions particularly relating to age, thus, fixing of eligible age as fifty years cannot be treated to be in

contradiction to the directions issued in MBA-III. Even if it is contravening to any such direction, the legislature is within its jurisdiction to determine

the minimum eligibility age for the purpose of appointment.

35. Mr. R. Gandhi, the President of Madras Bar Association challenged the provisions of The Companies Act, 1956 as amended by Central Act 11 of

2003 when Part 1B and Part 1C were inserted constituting National Company Law Tribunal and the Appellate Tribunal respectively before the

Madras High Court. The High Court allowed the writ petition [2004 (2) Current Tamil Nadu Cases 561] on 30.3.2004. The High Court held that the

power of reappointment was read to be a Ã¢â‚¬Ëœrenewalâ€â„¢, apart from rendering many provisions of the amending Act as illegal in as much as they

were in breach of basic constitutional scheme of separation of powers and independence of the judicial function. The Madras High Court held as

under:

Ã¢â‚¬Å“74. Unless the term of office is fixed as at least five years with a provision for renewal, except in cases of incapacity, misconduct and the like,

and the period for which lien may be retained is fixed at not more than one year, the constitution of the Tribunal cannot be regarded as satisfying the

essential requirements of an independent and impartial body exercising judicial functions of the State.

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123. In the light of foregoing discussions it is declared that until the provisions in parts 1B and 1C of the Companies Act introduced by the Companies

(Amendment) Act, 2002, which have been found to be defective in as much as they are in breach of the basic constitutional scheme of separation of

powers and independence of the judicial function, are duly amended, by removing the defects that have been pointed out, it would be unconstitutional

to constitute a Tribunal and Appellate Tribunal to exercise the jurisdiction now exercised by the High courts or the Company Law Board.Ã¢â‚¬â€‹

36. In an appeal against the said order, this Court in MBA-I noticed the contention of the Union as under:

Ã¢â‚¬Å“11. The Union Government has accepted the finding and agreed to amend Sections 10-FE and 10-FT of the Act to provide for a five-year term

for the Chairman/President/Members. However, the Government proposes to retain the provision for reappointment instead of Ã¢â‚¬Å“renewalÃ¢â‚¬, as the

reappointments would be considered by a Selection Committee which would be headed by the Chief Justice of India or his nominee. As the

Government proposes to have minimum eligibility of 50 years for first appointment as a Member of the Tribunal, a Member will have to undergo the

process of reappointment only once or twice.Ã¢â‚¬â€‹

37. The finding of the High Court that the President or the Chairman was entitled to renewal of term was not accepted.

This Court held as under:

Ã¢â‚¬Å“120 (ix). The term of office of three years shall be changed to a term of seven or five years subject to eligibility for appointment for one more

term. This is because considerable time is required to achieve expertise in the field concerned. A term of three years is very short and by the time the

members achieve the required knowledge, expertise and efficiency, one term will be over. Further the said term of three years with the retirement age

of 65 years is perceived as having been tailor-made for persons who have retired or shortly to retire and encourages these Tribunals to be treated as

post-retirement havens. If these Tribunals are to function effectively and efficiently they should be able to attract younger members who will have a

reasonable period of service.Ã¢â‚¬â€‹

38. Subsequently, the Companies Act, 2013 was enacted, repealing the Companies Act, 1956. The said Act provided for establishment of National

Company Law Tribunal and National Company Law Appellate Tribunal. The provisions of the new Companies Act, 2013 were upheld by this Court

subject to certain modifications as provided in MBA-II. The provisions of the Act which were not challenged or interfered with are contained in

Sections 413 and 414 of the Act. Sections 413 prescribes that a person who has not completed fifty years of age shall not be eligible to be appointed

as a Member or Chairperson.

39. This Court in MBA-II held the provisions contained under Section 409(3)(a), (c) and Section 411(3) of the Companies Act, 2013 to be invalid. The

appointments of technical members as in the Madras Bar judgment rendered in the year 2010 were to be scrupulously followed. This Court held as

under:

Ã¢â‚¬Å“28. Having regard to the aforesaid clear and categorical dicta in 2010 judgment [(2010) 11 SCC 1], tinkering therewith would evidently have the

potential of compromising with standards which the 2010 judgment [(2010) 11 SCC 1] sought to achieve, nay, so zealously sought to secure. Thus, we

hold that Sections 409(3)(a) and (e) are invalid as these provisions suffer from same vice. Likewise, Section 411(3) as worded, providing for

qualifications of Technical Members, is also held to be invalid. For appointment of Technical Members to NCLT, directions contained in sub-paras (ii),

(iii), (iv), (v) of para 120 of the 2010 judgment [(2010) 11 SCC 1] will have to be scrupulously followed and these corrections are required to be made

in Section 409(3) to set right the defects contained therein. We order accordingly, while disposing of Issue 2.Ã¢â‚¬â€‹

40. In MBA-II, the age for appointment of members of the National Law Company Tribunal was fixed as fifty years. Same was not disputed by the

present petitioner in the writ petition before the Madras High Court or before this Court. Therefore, the age of 50 years as the eligibility condition is

not off the hat but is based upon previous legislation in respect of members of the National Company Law Tribunal. Thus, the fixation of fifty years of

age as the eligibility condition cannot be said to be manifestly arbitrary or violative of any of the Fundamental Rights of any of the candidates which

may render such condition of age as illegal. The argument is based on apprehension that it would be difficult for an advocate appointed after attaining

the age of fifty years to resume legal practice after completion of one term, in case he is not reappointed. A person who is competent and good in his

work will not find any difficulty to resume his practice but what would happen to his professional career if his term is not extended is a calculated risk

which a candidate shall take at the time of seeking appointment. Such apprehensions as to what will happen in future cannot be a ground to strike

down a condition of age in the statute. This Court is not possessed of the expertise to say that it will be difficult for an advocate to resume practice if

he is not reappointed. I am unable to agree that the statutory provisions can be struck down on such grounds based on presumed apprehensions.

41. The apprehensions or misuse of a statutory provision is not a ground to declare the provisions of a statute as void. A five Judges Bench of this

Court [Collector of Customs, Madras & Anr. v. Nathella Sampathu Chetty & Anr., AIR 1962 SC 316] held as under:

Ã¢â‚¬Å“33. Ã¢â‚¬Â¦This Court has held in numerous rulings, to which it is unnecessary to refer, that the possibility of the abuse of the powers under the

provisions contained in any statute is no ground for declaring the provision to be unreasonable or void. Commenting on a passage in the judgment of

the Court of Appeal of Northern Ireland which stated:

Ã¢â‚¬Å“If such powers are capable of being exercised reasonably it is impossible to say that they may not also be exercised unreasonablyÃ¢â‚¬â€‹

and treating this as a ground for holding the statute invalid Viscount Simonds observed in Belfast Corporation v. O.D. Commission [1960 AC 490 at

pp. 520-521] :

Ã¢â‚¬Å“It appears to me that the short answer to this contention (and I hope its shortness will not be regarded as disrespect) is that the validity of a

measure is not to be determined by its application to particular cases.Ã¢â‚¬Â¦ If it is not so exercised (i.e. if the powers are abused) it is open to challenge

and there is no need for express provision for its challenge in the statute.Ã¢â‚¬â€‹

The possibility of abuse of a statute otherwise valid does not impart to it any element of invalidity. The converse must also follow that a statute which

is otherwise invalid as being unreasonable cannot be saved by its being administered in a reasonable manner. The constitutional validity of the statute

would have to be determined on the basis of its provisions and on the ambit of its operation as reasonably construed. If so judged it passes the test of

reasonableness, possibility of the powers conferred being improperly used is no ground for pronouncing the law itself invalid and similarly if the law

properly interpreted and tested in the light of the requirements set out in Part III of the Constitution does not pass the test it cannot be pronounced

valid merely because it is administered in a manner which might not conflict with the constitutional requirements.Ã¢â‚¬â€‹

42. Similar view was reiterated by this Court in number of judgments [Government of Andhra Pradesh & Anr. v. G. Jaya Prasad Rao & Ors., (2007)

11 SCC 528; PeopleÃ¢â‚¬â„¢s Union for Civil Liberties & Anr. v. Union of India, (2004) 9 SCC 580; Charan Lal Sahu v. Union of India, (1990) 1 SCC

613]. In another judgment [Mehmood Alam Tariq & Ors. v. State of Rajasthan & Ors., (1988) 3 SCC 241], it was held as under:

Ã¢â‚¬Å“24. Ã¢â‚¬Â¦ It is also necessary to reiterate that a mere possibility of abuse of a provision, does not, by itself, justify its invalidation. The validity of a

provision must be tested with reference to its operation and efficiency in the generality of cases and not by the freaks or exceptions that its application

might in some rare cases possibly produce. The affairs of government cannot be conducted on principles of distrust. If the selectors had acted mala

fide or with oblique motives, there are administrative law remedies to secure reliefs against such abuse of powers. Abuse vitiates any power.Ã¢â‚¬

(Emphasis supplied)

43. Therefore, I am of the opinion that in case of failing to secure reappointment, the candidate will not be able to resume practice is based upon

apprehensions. Whether they are good or valid grounds to refuse reappointment can be subject matter of judicial review although I am of the opinion

that the decision of the high-power Search and Selection Committee not to re-appoint a candidate may not warrant interference in exercise of judicial

review.

Legality and validity of the Second & Third proviso to Section 184(1) of the Ordinance

44. The said proviso reads thus:

Ã¢â‚¬Å“ Provided further that the allowances and benefits so payable shall be to the extent as are admissible to a Central Government officer holding the

post carrying the same pay:

Provided also that where the Chairperson or Member takes a house on rent, he may be reimbursed a house rent subject to such limits and conditions

as may be provided by rules.Ã¢â‚¬â€‹

45. The second proviso is to the effect that allowances and ben-efits shall be to the extent as are admissible to a Central Government officer holding

the post carrying the same pay. The third proviso to Section 184(1) is that where Chairper-son or Members take a house on rent, he may be reim-

bursed a house rent subject to such limits and conditions as may be prescribed. In terms of third proviso, the Tribunal, Appellate Tribunal and other

Authorities (Qualifications, Experience and other Conditions of Service of Members) (Amendment) Rules, 2021 have been published. As per the

Rules now notified, the Chairman, Chairperson, President, Vice Chairman, Vice Chairperson or Vice President shall have option to avail of

accommodation to be provided by the Central Government as per the rules for the time being in force or entitled to house rent allowance subject to a

limit of Rs. one lakh fifty thousand rupees per month and the Members shall have option to avail of accommodation to be provided by the Central

Government as per the rules for the time being in force or entitled to house rent allowance subject to a limit of Rs.one lakh twenty-five thousand

rupees per month with effect from the 1st January, 2021. Therefore, the directions issued stands complied with.

46. As a matter of fact, there is a common grievance of the members of the Bar and the litigating parties other than from Delhi that there is a

concentration of Tribunals in Delhi which deprives the advocates from other parts of the country to deal with the matters entrusted to the Tribunals. It

is also expensive for the litigants to engage professional services in Delhi, which is out of capacity for a large section of the society. In fact, because

of housing scarcity and expensive professional services, it will be open to the Government/legislature to shift the principal benches of the certain

Tribunals outside Delhi so that concentration of Tribunals in Delhi is minimized which will in turn help the Bar to grow at different places, ensuring

affordable administration of justice and resolution of the challenge of scarcity of housing in Delhi.

Section 184(7)

47. The direction of this Court in Para 53(ix) was that the Union shall make appointments to Tribunals within three months whereas the Ordinance has

used the expression that the Central Government shall take a decision on the recommendations of the Committee Ã¢â‚¬Å“preferably within three

monthsÃ¢â‚¬. Both the directions in sub-para (ix) and in sub-section (7) are only directory. It is well-settled that the use of expression Ã¢â‚¬Ëœshallâ€¢ or

Ã¢â‚¬Ëœmayâ€¢ is not determinative of the fact that whether the condition is mandatory or directory. Therefore, there is no reason to set aside the

expression Ã¢â‚¬Ëœpreferablyâ€¢ used in sub-section (7) of Section 184. Such directions were issued in terms of Article 142 of the Constitution which

stop at the four walls of the Parliament. The language to be used falls within the legislative competence and do not violate any fundamental right nor

can be said to be manifestly arbitrary.

Whether the Ordinance nullifies the judgment of this Court in MBA-III without removing the defect in the 2020 Rules?

48. The Petitioner herein has relied upon certain judicial pronouncements to contend that the effect of the Ordinance is to nullify the judgment of this

Court in MBA-III without removing the defects in the 2020 Rules. They are produced and analyzed hereinbelow.

49. In a judgment [Shri Prithvi Cotton Mills Ltd. & Anr. v. Broach Borough Municipality & Ors., (1969) 2 SCC 283] relied upon, the levy of the

property tax was found to be not legal in view of the language of the Statute. The State legislature thus altered the basis of levy of property tax.

Therefore, the said judgment is not appliable to the facts of the present case where the directions were issued dehors the legality of the 2020 Rules.

50. The reliance on another judgment of this Court [Madan Mohan Pathak & Anr. v. Union of India & Ors., (1978) 2 SCC 50] is not tenable wherein

a settlement was arrived at regarding payment of bonus effective from April 1, 1973 to March 31, 1977 with four different associations of employees.

A writ of Mandamus was issued by the Calcutta High Court. The Payment of Bonus (Amendment) Ordinance, 1975 was thereafter promulgated in

September, 1975. The Payment of Bonus Act was not applicable to the Life Insurance Corporation by virtue of Section 32 of the said impugned Act.

This Court found that the impugned Act did not set at naught the entire settlement relating to payment of annual cash bonus of Class III and Class IV

employees and that too from April, 1 1975. Since the settlement had attained finality as the same was approved by the Board of Directors as well as

by the Central Government, and that the Writ of Mandamus was issued by the Calcutta High Court to pay annual cash bonus to the employees, it was

held that the judgment can be remedied by way of an appeal or review, but it cannot be disregarded or ignored and must be obeyed by Life Insurance

Company. In S.S. Bola & Ors. v. B.D. Sardana & Ors. (1997) 8 SCC 522, this Court explained the Judgment in Madan Mohan Pathak. It was found

that in as much as six HonÃ¢â‚¬â„¢ble Judges out of seven rested their decision on the ground that the impugned Act violates Article 31(2) of the

Constitution and did not consider the enactment in question to be an act of usurpation of judicial power by the legislature. It was held as under:

Ã¢â‚¬Å“189Ã¢â‚¬Â¦Ã¢â‚¬Â¦Ã¢â‚¬Â¦The majority judgment came to hold that the impugned Act is violative of Article 31 clause (2) as the effect of the Act was to

transfer ownership debts due owing to Class III and Class IV employees in respect of annual cash bonus to the Life Insurance Corporation and there

has been no provision for payment of any compensation for the compulsory acquisition of these debts It may be stated that the majority judgment did

not consider the question as to whether the legislatures by enacting the Act have usurped the judicial power and have merely declared the judgment of

a competent court of law to be invalid. Beg, CJ. in his concurring judgement in para 32 of the judgment, however, has observed that the real object of

the Act was to set aside the result of the mandamus issued by the Calcutta High Court, though, it does not mention as such, and therefore, the learned

Judge held that Section 3 of the Act would be invalid for trenching upon the judicial power.

190. Three other learned Judges, namely, Y.V. Chan-drachud, S. Murtaza Fazal Ali and P.N. Shinghal, JJ. agreed with the conclusion of Bhagwati, J.

but pre-ferred to rest their decision on the sole ground that the impugned Act violates the provisions of Article 31(2) of the Constitution and in fact

they considered it unnecessary to express any opinion on the effect of the judgment of the Calcutta High Court in Writ Pe-tition No.371 of 1976. Thus

out of seven learned Judges, six learned Judges rested their decision on the ground that the impugned Act violates Article 31(2) of the Constitution and

did not consider the en-actment in question to be an act of usurpation of ju-dicial power by the legislature. The observation of Beg, C.J., in para 32

does not appear to be in conso-nance with the several authorities of this Court on the point to be discussed hereafterÃ¢â‚¬Â¦Ã¢â‚¬Â¦.Ã¢â‚¬â€‹

51. In B.K. Pavitra v. Union of India (2019) 16 SCC 129, the judgment in Madan Mohan Pathak has been considered. It was held that the said case

did not involve a situation where a law was held to be ultra vires and the basis of the declaration of invalidity of the law was sought to be cured. It was

observed as under:

Ã¢â‚¬Å“83.2. Indian Aluminium Co. [Indian Aluminium Co. v. State of Kerala, (1996) 7 SCC 637] , where it was held that : (SCC p. 660, para 49)

Ã¢â‚¬Å“49. In Madan Mohan Pathak v. Union of India [Madan Mohan Pathak v. Union of India, (1978) 2 SCC 50 : 1978 SCC (L&S) 103] Ã¢â‚¬Â¦ From the

observations made by Bhagwati, J. per majority, it is clear that this Court did not intend to lay down that Parliament, under no circumstance, has power

to amend the law removing the vice pointed out by the court. Equally, the observation of Chief Justice Beg is to be understood in the context that as

long as the effect of mandamus issued by the court is not legally and constitutionally made ineffective, the State is bound to obey the directions. Thus

understood, it is unexceptionable. But it does not mean that the learned Chief Justice intended to lay down the law that mandamus issued by court

cannot at all be made ineffective by a valid law made by the legislature, removing the defect pointed out by the court.Ã¢â‚¬â€‹

(emphasis supplied)

84. Madan Mohan Pathak [Madan Mohan Pathak v. Union of India, (1978) 2 SCC 50 : 1978 SCC (L&S) 103] involved a situation where a

parliamentary law was enacted to override a mandamus which was issued by the High Court for the payment of bonus under an industrial settlement.

The case did not involve a situation where a law was held to be ultra vires and the basis of the declaration of invalidity of the law was sought to be

cured.Ã¢â‚¬â€‹

52. Another judgment [State of Tamil Nadu v. State of Kerala, (2014) 12 SCC 696] which has been relied upon dealt with an inter-se water dispute

between two states relating to the height of Mullaperiyar Dam. Kerala Irrigation and Water Con-servation Act, 2003 [For short, Ã¢â‚¬Ëœ2003 ActÃ¢â‚¬â„¢]

was enacted by Kerala legislature, which came into force on 18.09.2003. Such Act was neither referred to nor relied upon by the State of Kerala at

the time of hearing by this Court on 27.2.2006. On 18.03.2006, in less than three weeks of the decision of this Court [Mullaperiyar Environmental

Protection Forum v. Union of India, (2006) 3 SCC 643], the Ker-ala State legislature amended the 2003 Act by introducing Kerala Irrigation and

Water Conservation (Amendment) Act, 2006 [For short, Ã¢â‚¬Ëœ2006 (Amendment) ActÃ¢â‚¬â„¢], which was the subject matter of judgment in ques-tion.

The said Act was challenged by the State of Tamil Nadu in an original suit before this Court. An argument was raised that the impugned legislation

amounts to usurpation of judi-cial power inasmuch as Kerala State Legislature has arro-gated to itself the role of a judicial body and has itself deter-

mined the questions regarding the dam safety and raising the water level when such questions fall exclusively within the province of the judiciary and

have already been deter-mined by this Court in its judgment dated 27.02.2006. This Court in an exhaustive judgment held as under:

Ã¢â‚¬Å“126. The decision of this Court on 27.02.2006 in the Mullaperiyar Environmental Protection Forum case was the result of judicial investigation,

founded upon facts ascertained in the course of hearing. It was strictly a judicial question. The claim of the State of Kerala was that water level

cannot be raised from its present level of 136 ft. On the other hand, Tamil Nadu sought direction for raising the water level to 142 ft. and, after

strengthening, to its full level of 152 ft. The obstruction by Kerala to the water level in the Mullaperiyar dam being raised to 142 ft. on the ground of

safety was found untenable, and, in its judgment, this Court so pronounced.

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154. Where a dispute between two States has already been adjudicated upon by this Court, which it is empowered to deal with, any unilateral law

enacted by one of the parties that results in overturning the final judgment is bad not because it is affected by the principles of res judicata but because

it infringes the doctrine of separation of powers and rule of law, as by such law, the legislature has clearly usurped the judicial power.

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164. In light of the above legal position, if the 2006 judgment is seen, it becomes apparent that after considering the contentions of the parties and

examining the reports of Expert Committee, this Court posed the issue for determination about the safety of the dam to increase the water level to 142

ft. and came to a categorical finding that the dam was safe for raising the water level to 142 ft. and, accordingly, in the concluding paragraph the

Court disposed of the writ petition and the connected matters by permitting the water level of Mullaperiyar dam being raised to 142 ft. and also

permitted further strengthening of the dam as per the report of the Expert Committee appointed by the CWC. The review petition filed against the said

decision was dismissed by this Court on 27.7.2006. The 2006 judgment having become final and binding, the issues decided in the said proceedings

definitely operate as res judicata in the suit filed under Article 131 of the Constitution.Ã¢â‚¬â€‹

53. Ram Pravesh Singh is another case where the State law was under consideration. It was not a case where the legislature had intervened to enact

a law contrary to the directions given by the High Court. Similarly, Karnail Singh was a case of interpretation of statute and not dealing with

enactment by the legislature or Parliament consequent to the directions issued by this Court. The law declared by this Court is binding on all Courts

within the territory of India under Article 141 of the Constitution whereas Article 142 of the Constitution empowers this Court to issue directions to do

complete justice. The interpretation of law is binding under Article 141 of the Constitution even if there is a direction under Article 142 but such

direction is not all pervasive and binding on the legislature. Such is the consistent line of judgments by this Court ending with three Judge Bench

judgment in Dr. Ashwani Kumar.

Proviso to Section 184 (11)

54. The inserted proviso to Section 184(11) by the Ordinance deals with two situations. One is in respect of the candidates appointed from 26.5.2017

till the notified date that is 4.4.2021 in terms of sub-Section (11) of Section 184. Second is in respect of the candidates who have not been appointed

falling within proviso to sub-Section (1) of Section 184, which provides that a person who has not completed the age of fifty years shall not be eligible

for appointment as a Chairperson or Member. There is no doubt that this is a prospective provision as no candidate who has not completed 50 years of

age is eligible to seek appointment.

55. I do not find any merit in the argument raised by Mr. Krishnan Venugopal that a selected candidate has a right to seek appointment and that too

within three months of the order of this Court. Firstly, a selected candidate has no right to seek appointment. A Constitution Bench of this Court

[Shankarsan Dash v. Union of India, (1991) 3 SCC 47] had held that the successful candidates do not acquire an indefeasible right to be appointed

which cannot be legitimately denied. This Court held as under:

Ã¢â‚¬Å“7. It is not correct to say that if a number of vacancies are notified for appointment and adequate number of candidates are found fit, the

successful candidates acquire an indefeasible right to be appointed which cannot be legitimately denied. Ordinarily the notification merely amounts to

an invitation to qualified candidates to apply for recruitment and on their selection they do not acquire any right to the post. Unless the relevant

recruitment rules so indicate, the State is under no legal duty to fill up all or any of the vacancies. However, it does not mean that the State has the

licence of acting in an arbitrary manner. The decision not to fill up the vacancies has to be taken bona fide for appropriate reasons. And if the

vacancies or any of them are filled up, the State is bound to respect the comparative merit of the candidates, as reflected at the recruitment test, and

no discrimination can be permitted. This correct position has been consistently followed by this Court, and we do not find any discordant note in the

decisions in Ã¢â‚¬Â¦Ã¢â‚¬Â¦Ã¢â‚¬Â¦Ã¢â‚¬â€‹

56. The fact that the legislation has intervened to prescribe a particular age which is at variance with the condition in the advertisement is a good

reason not to appoint the candidates. The legality of Sections 174, 175 and 184 of the Finance Act, 2017 has been upheld in the matter of Rojer

Mathew. Therefore, after such an amendment, appointments can be made only in terms of the Rules famed under Section 184 of the Finance Act.

Now, some of the Rules stand substituted by the Ordinance. Therefore, candidates who have not been appointed will have to seek appointment only in

terms of the substituted Section 184 of the Finance Act. The candidates who were selected cannot seek appointment on the basis of their old selection

and being in merit.

57. Some of the Chairpersons and Members of the Tribunals were appointed between 26.5.2017 to 4.4.2021 in terms of the interim orders passed by

this Court in Kudrat Sandhu. The argument raised is that such interim orders have been nullified though such orders were issued on the basis of

concession of the learned Attorney General and that such orders are couched in the form of mandate, therefore such mandatory orders cannot be

nullified.

58. The concession of the learned Attorney General at the time when interim orders were passed was in view of the prevalent situation to keep the

Tribunals functional. The interim orders in Rojer Mathew have merged with the final orders wherein again, this Court directed the appointments to the

Tribunals and terms of conditions of appointment shall be in terms of the respective statute before the enactment of the Finance Bill, 2017. Liberty

was granted to the Union to seek modification of this order. Therefore, the interim order which permitted the appointments now stands subsumed in

the Ordinance which has defined the tenure and the terms and conditions of appointment. The Ordinance is in fact in terms of the liberty granted to

Union to seek modification. Mere fact that an application for modification is pending will not bar the legislature to enact a statute by way of an

Ordinance. The appointments made after 26.5.2017 by virtue of Section 184(11) will be governed not by the parent statute but by the terms and

conditions as enumerated in the Ordinance. The consent of the learned Attorney General will not act as an estoppel against the statute i.e. the

Ordinance.

59. The interim orders which have been set aside by this Court such as in Cauvery Water Disputes Tribunal, or the Medical Council of India were the

cases where the State Legislature had nullified interim orders simpliciter without even attempting to cure the defects.

60. The judgment in Virender Singh Hooda is quite different. The appellants before this Court were successful in an ear-lier round of litigation and

were thus appointed. It was there-after that the Act in question was enacted with retrospective effect. The appellants were falling in the first category

out of three category of candidates such as (i) those who had been appointed in implementation of decision in Hooda and Sandeep Singh's cases

before passing of the impugned Act

(ii) those, though not so appointed, who have judgments of High Court passed in their favour relying upon Hooda and Sandeep Singh's cases, and claim

a right to appointment but would be deprived of it if the validity of the Act is upheld and on that basis the judgments of the High Court upturned and

(iii) those, who would be covered by law laid down in Hooda's case on interpretation and applicability of the aforenoted two circulars. This Court held

as under: Ã¢â‚¬Å“47. There is a distinction between encroachment on the judicial power and nullification of the effect of a judicial decision by changing

the law retrospec-tively. The former is outside the competence of the legislature but the latter is within its permissible limits {M/s Tirath Ram Rajindra

Nath, Lucknow v. State of U.P. & Anr., [(1973) 3 SCC 585]}. The rea-son for this lies in the concept of separation of pow-ers adopted by our

constitutional scheme. The adju-dication of the rights of the parties according to law is a judicial function. The legislature has to lay down the law

prescribing norms of conduct which will gov-ern parties and transactions and to require the court to give effect to that law [I.N. Saksena's case

(supra)].

48. The legislature can change the basis on which a decision is given by the Court and thus change the law in general, which will affect a class of

persons and events at large. It cannot, however, set aside an individual decision inter parties and affect their rights and liabilities alone. Such an act on

the part of the legislature amounts to exercising the judicial power by the State and to function as an appellate court or tribunal, which is against the

concept of separation of powers. {Re : Cauvery Water Disputes Tribunal [1993 Supp.(1) SCC 96(II)]}.

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52. It is not possible to accept the contention that vested rights cannot be taken away by legislature by way of retrospective legislation. Taking away

of such right would, however, be impermissible if vi-olative of Articles 14, 16 and any other constitu-tional provision. In State of Tamil Nadu v.

Aroorran Sugars Ltd., [(1997) 1 SCC 326], this Court held that whenever any amendment is brought in force retro-spectively or any provision of the

Act is deleted ret-rospectively, in this process rights of some are bound to be affected one way or the other. In every case, it cannot be urged that the

exercise by the legislature while introducing a new provision or deleting an existing provision with retrospective ef-fect per se shall be violative of

Article 14 of the Con-stitution. If that stand is accepted, then the neces-sary corollary shall be that legislature had no power to legislate retrospectively,

because in that event a vested right is affected.Ã¢â‚¬â€‹

61. It is thereafter that this Court protected the appointment of candidates falling in the first category i.e., those who were appointed prior to the

commencement of the Act in ques-tion. It was held as under:

Ã¢â‚¬Å“68. Despite the aforesaid conclusion, the Act [proviso to Section 4(3)] to the extent it takes away the appointments already made, some of the

petitioners had been appointed much before enforcement of the Act (ten in number as noticed hereinbefore) in implementation of this Court's decision,

would be unreasonable, harsh, arbitrary and violative of Article 14 of the Constitution. The law does not permit the legislature of take back what has

been granted in implementation of the court's decision. Such a course is impermissibleÃ¢â‚¬â€‹.

62. The candidates in question were appointed during the pen-dency of lis. These appointments were not concluded ap-pointments but were subject to

the provisions of the parent Act which has been amended by the Finance Act, 2017. They cannot claim any right to continue on the post till the age of

retirement under the parent Act in terms of proviso to sub-section (11) of Section 184 of the Finance Act as substi-tuted. The provisions of the parent

Act cease to be in exis-tence with the order passed in Rojer Mathew and subse-quent legislative enactments introduced by way of the Ordi-nance.

63. Thus, I find that the first, second and third proviso to Section 184(1), the use of expression Ã¢â‚¬Ëœpreferably Ã¢â‚¬â„¢ in Section 184(7) and the proviso to

Section 184(11) are legal and valid as such provisions fall within the exclusive domain of the legislature. The legislature has not nullified the judgment

of this Court on the above aspects as there were no such corresponding provisions in the 2020 Rules, which were part of judicial review process.

64. It is open to the legislature to fix tenure of the Chairperson and the members other than four years as the tenure of four years was found to be not

tenable in MBA-III. Section 184(7) which contemplates that Select Committee should recommend a panel of two names is contrary to the directions

of this Court in MBA-III. Thus, Section 184(11)(i)(ii) and Section 184(7) is declared to be void as the Ordinance has reiterated the provisions which

were in 2020 Rules. The challenge to other provisions is not legally sustainable. The writ petition is thus dismissed except to the extent mentioned

above.

S. Ravindra Bhat, J

1. One may well ask why there is need for a concurrence when the judgment with which this author agrees, both as to its reasoning as well as its

conclusions, is as fully and well-reasoned as L. Nageswara Rao, JÃ¢â‚¬â„¢s judgment is. The reason lies in the importance of the themes which have

been deliberated- independence of the judiciary and separation of powers, both of which are timeless in their resonance and relevance. This brief

prefatory aside at the beginning, outlines the approach this opinion strives to take, while wholeheartedly supporting the conclusions recorded by Rao, J.

With great respect to Hemant Gupta, J, I cannot persuade myself to agree with him, that as regards prescription of minimum age (for appointment to

tribunals, i.e. 50 years) or with respect to conditions of service such as payment of house rent allowance, this court ought to respect legislative

wisdom, and that directions issued in past judgments cannot bind Parliament, as they fell outside the judicial sphere.

2. Independence of the judiciary is one of the foundational pillars of every democracy governed by the rule of law, where the constitution reigns

supreme. Some constitutions may guarantee this in emphatic terms, whereas in others, there may be no single provision manifested in the constitution,

but rather, the idea may emerge as a compelling inference - through the kind of assurances articulated by express provisions (tenure, eligibility, age of

superannuation, conditions where removal is possible only through Parliamentary or legislative process, manner of appointment etc). The Attorney

GeneralÃ¢â‚¬â„¢s assertion that since there is no single provision which expressly articulates independence of the judiciary, and that being the case, the

court cannot direct the length of tenure or other eligibility conditions which are in the domain of the executive, (which, as a co-equal organ of

governance) is exclusively entitled to prescribe criteria for selection of tribunal members, therefore, needs careful scrutiny.

3. The original constitution did not expressly Ã¢â‚¬" through any entry in the three legislative lists, deal with tribunals. This field of legislation, creating

courts, was left to Parliament [Entries 77,78 and 79, List I, Seventh Schedule to the Constitution of India.] as well as the states [Entry 65, List II,

Seventh Schedule to the Constitution of India]. The absence of an entry pertaining to tribunals meant that the creation of administrative and quasi-

judicial tribunals, or offices and agencies conferred with quasi-judicial functions - was recognised as part of legislative activity, whereby laws could

create appropriate bodies for their enforcement in exercise of Ã¢â‚¬Å“incidentalÃ¢â‚¬ and Ã¢â‚¬Å“ancillary powersÃ¢â‚¬ adjunct to the concerned legislative head.

As has been elaborated by L. Nageswara Rao, J., the Constitution (Forty Second) Amendment Act, 1976 introduced Articles 323A [Which enables

setting up of tribunals to adjudicate disputes Ã¢â‚¬Å“with respect to recruitment and conditions of service of persons appointed to public services and posts

in connection with the affairs of the Union or of any State or of any local or other authorityÃ¢â‚¬] and 323B [Which enables setting up of tribunals to

adjudicate disputes relating to: Ã¢â‚¬Å“a) levy, assessment, collection and enforcement of any tax; (b) foreign exchange, import and export across customs

frontiers; (c) industrial and labour disputes; (d) land reforms by way of acquisition by the State of any estate as defined in article 31A or of any rights

therein or the extinguishment or modification of any such rights or by way of ceiling on agricultural land or in any other way; (e) ceiling on urban

property; (f) elections to either House of Parliament or the House or either House of the Legislature of a State, but excluding the matters referred to

in article 329 and article 329A; (g) production, procurement, supply and distribution of food-stuffs (including edible oilseeds and oils) and such other

goods as the President may, by public notification, declare to be essential goods for the purpose of this article and control of prices of such goods; (h)

rent, its regulation and control and tenancy issues including the right, title and interest of landlords and tenants; (i) offences against laws with respect to

any of the matters specified in sub-clauses (a) to (h) and fees in respect of any of those matters; (j) any matter incidental to any of the matters

specified in sub-clauses (a) to (i).Ã¢â‚¬] which paved the way for the creation of tribunals as substitutes for courts. Many tribunals [The Telecom

Disputes Settlement Commission, the Appellate Tribunal for Electricity; the Securities Appellate Tribunal; Consumer forums and the National

Consumer Disputes Redressal Commission;] which were created by legislation introduced in the 1990s and the decade beginning in 2000 do not

conform to the heads or subject matters enumerated in either of those Articles. Yet, they were created under the relevant fields of legislation

combined with Entry 11A of the Concurrent List (List III, Seventh Schedule to the Constitution of India). [Entry 11A pertains to Ã¢â‚¬Ëœ Administration of

justice, constitution and organisation of all courts, except the Supreme Court and High CourtsÃ¢â‚¬â„¢.]

4. The UnionÃ¢â‚¬â„¢s position that when a legislation or legislative instrument (such as an ordinance in this case) is questioned, its validity can be

scrutinized only by considering its impact on some express provision of the constitution, and not on any concept or notion such as separation of powers

and judicial independence, requires examination in the first instance.

5. There can be no doubt that any enactment or subordinate legislation can be questioned as offending a constitutional provision. However, does this

articulation preclude a challenge based on principles which are evident in the constitution, but yet, are not clearly spelt out in its plain text through any

express provision? In the Constitution Bench judgment of this court in Madras Bar Association v. Union of India (2014) 10 SCC 1 (Ã¢â‚¬Å“MBA-IÃ¢â‚¬) the

issue was whether High Courts could be divested of their statutory appellate jurisdiction in tax disputes, which they had been exercising for over 80

years, to confer this jurisdiction on a new tribunal whose membership was to be different from judges of High Courts. This court then examined the

applicability of the basic structure doctrine, of which independence of the judiciary and separation of powers have been held to be a part, and observed

as follows:

Ã¢â‚¬Å“113.2. We have given our thoughtful consideration to the submission advanced at the hands of the learned counsel for the petitioners

insofar as the first perspective is concerned. We find substance in the submission advanced at the hands of the learned counsel for the

petitioners, but not exactly in the format suggested by the learned counsel. A closer examination of the judgments relied upon lead us to the

conclusion, that in every new Constitution, which makes separate provisions for the legislature, the executive and the judiciary, it is taken

as acknowledged/conceded that the basic principle of Ã¢â‚¬Å“separation of powersÃ¢â‚¬ would apply. And that, the three wings of governance

would operate in their assigned domain/province. The power of discharging judicial functions which was exercised by members of the

higher judiciary at the time when the Constitution came into force should ordinarily remain with the court, which exercised the said

jurisdiction at the time of promulgation of the new Constitution. But the judicial power could be allowed to be exercised by an

analogous/similar court/tribunal with a different name. However, by virtue of the constitutional convention while constituting the analogous

court/tribunal it will have to be ensured that the appointment and security of tenure of Judges of that court would be the same as of the

court sought to be substituted. This was the express conclusion drawn in Hinds case [Hinds v. R., 1977 AC 195 : (1976) 2 WLR 366 : (1976)

1 All ER 353 (PC)] . In Hinds case [Hinds v. R., 1977 AC 195 : (1976) 2 WLR 366 : (1976) 1 All ER 353 (PC)] , it was acknowledged that

Parliament was not precluded from establishing a court under a new name to exercise the jurisdiction that was being exercised by members

of the higher judiciary at the time when the Constitution came into force. But when that was done, it was critical to ensure that the persons

appointed to be members of such a court/tribunal should be appointed in the same manner and should be entitled to the same security of

tenure as the holder of the judicial office at the time when the Constitution came into force. Even in the treatise Constitutional Law of

Canada by Peter W. Hogg, it was observed: if a province invested a tribunal with a jurisdiction of a kind, which ought to properly belong

to a Superior, District or County Court, then that court/tribunal (created in its place), whatever is its official name, for constitutional

purposes has to, while replacing a Superior, District or County Court, satisfy the requirements and standards of the substituted court. This

would mean that the newly constituted court/tribunal will be deemed to be invalidly constituted, till its members are appointed in the same

manner, and till its members are entitled to the same conditions of service as were available to the Judges of the court sought to be

substituted. In the judgments under reference it has also been concluded that a breach of the above constitutional convention could not be

excused by good intention (by which the legislative power had been exercised to enact a given law). We are satisfied, that the aforesaid

exposition of law is in consonance with the position expressed by this Court while dealing with the concepts of Ã¢â‚¬Å“separation of powersÃ¢â‚¬,

the Ã¢â‚¬Å“rule of lawÃ¢â‚¬ and Ã¢â‚¬Å“judicial reviewÃ¢â‚¬. In this behalf, reference may be made to the judgments in L. Chandra Kumar case [L.

Chandra Kumar v. Union of India, (1997) 3 SCC 261 : 1997 SCC (L&S) 577] , as also, in Union of India v. Madras Bar Assn. [Union of

India v. Madras Bar Assn., (2010) 11 SCC 1] Therein, this Court has recognised that transfer of jurisdiction is permissible but in effecting

such transfer, the court to which the power of adjudication is transferred must be endured with salient characteristics, which were

possessed by the court from which the adjudicatory power has been transferred. In recording our conclusions on the submission advanced

as the first perspective, we may only state that our conclusion is exactly the same as was drawn by us while examining the petitioners'

previous submission, namely, that it is not possible for us to accept that under recognised constitutional conventions, judicial power vested

in superior courts cannot be transferred to coordinate courts/tribunals. The answer is, that such transfer is permissible. But whenever there

is such transfer, all conventions/customs/practices of the court sought to be replaced have to be incorporated in the court/tribunal created.

The newly created court/tribunal would have to be established in consonance with the salient characteristics and standards of the court

which is sought to be substituted.Ã¢â‚¬â€‹

6. Likewise, in Dr. D.C. Wadhwa & Ors v. State of Bihar & Ors, 1987 (1) SCR 198 a constitution bench of this court held that the power to

promulgate an ordinance does not enable the executive to re-promulgate it several times, without seeking its enactment by the appropriate legislature.

There is no provision in the constitution, which precludes the executive from re-promulgating ordinances; yet this court ruled that to be the case, and

observed as follows:

Ã¢â‚¬Å“The Executive cannot by taking resort to an emergency power exercisable by it only when the Legislature is not in Session, take over the

law- making function of the Legislature. That would be clearly subverting the democratic process which lies at the core of our constitutional

scheme, for then the people would be governed not the laws made by the Legislature as provided in the Constitution but by laws made by the

Executive. The Government cannot by-pass the Legislature and without enacting the provisions of the Ordinance into an Act of the

Legislature, repromulgate the Ordinance as soon as the Legislature is prorogued. Of course, there may be a situation where it may not be

possible for the Government to introduce and push through in the Legislature a Bill containing the same provisions as in the Ordinance,

because the Legislature may have too much legislative business in a particular Session or the time at the disposal of the Legislature in a

particular Session may be short, and in that event, the Governor may legitimately find that it is necessary to repromulgate the Ordinance.

Where such is the case, re-promulgation of the Ordinance may not be open to attack. But otherwise, it would be a colourable exercise of

power on the part of the Executive to continue an Ordinance with substantially the same provisions beyond the period limited by the

Constitution, by adopting the methodology of repromulgation.Ã¢â‚¬â€‹

7. The above decision was endorsed in Krishna Kumar Singh v. State of Bihar (2017) 3 SCC 1 which also held that re-promulgation Ã¢â‚¬Å“represents an

effort to overreach the legislative body which is a primary source of law-making authority in a parliamentary democracy.Ã¢â‚¬â€<The court pointed out that:

Ã¢â‚¬Å“The danger of repromulgation lies in the threat which it poses to the sovereignty of Parliament and the State Legislatures which have

been constituted as primary law-givers under the Constitution. Open legislative debate and discussion provides sunshine which separates

secrecy of Ordinance-making from transparent and accountable governance through law-making.Ã¢â‚¬â€<

8. In a decision of the Privy Council (which has been cited and approved by decisions of this court, including in Kesavananda Bharati v. State of

Kerala 1973 Supp. SCR 1) viz, Liyanage v. The Queen [1967] 1 AC 259, 287Ã¢â‚¬"288 the compulsive, though inarticulate premise of these principles

was elaborated in the following manner:

Ã¢â‚¬Å“What, however, is implicit in the very structure of a Constitution on the Westminster model is that judicial power, however it be

distributed from time to time between various courts, is to continue to be vested in persons appointed to hold judicial office in the manner

and on the terms laid down in the Chapter dealing with the judicature, even though this is not expressly stated in the Constitution.Ã¢â‚¬â€<

9. In L. Chandra Kumar v Union of India 1997 (3) SCC 261 this court invalidated Section 28 of the Administrative Tribunals Act on the ground that it

excluded jurisdiction under Articles 226 and 227, and was thus in conflict with the basic structure of the constitution, as judicial review was part of the

basic structure:

Ã¢â‚¬Å“100. In view of the reasoning adopted by us, we hold that Clause 2(d) of Article 323A and Clause 3(d) of Article 323B, to the extent

they exclude the jurisdiction of the High Courts and the Supreme Court under Articles 226/227 and 32 of the Constitution, are

unconstitutional. Section 28 of the Act and the ""exclusion of jurisdiction"" clauses in all other legislations enacted under the aegis of Articles

323A and 323B would, to the same extent, be unconstitutional. The jurisdiction conferred upon the High Courts under Articles 226/227 and

upon the Supreme Court under Article 32 of the Constitution is part of the inviolable basic structure of our Constitution.Ã¢â‚¬â€<

In Ismail Faruqui v Union of India (1994) 6 SCC 360 provisions of a Central enactment the Acquisition of Certain Area at Ayodhya Act, 1993 (No. 33

of 1993) [Section 4 (3)] which abated all pending legal proceedings was held to be unconstitutional because: it amounted to Ã¢â‚¬Å“an extinction of the

judicial remedy for resolution of the dispute amounting to negation of rule of law. Sub-section (3) of Section 4 of the Act is, therefore, unconstitutional

and invalid.Ã¢â‚¬It is therefore, too late in the day to contend that infringement by a statute, of the concept of independence of the judiciary - a basic or

essential feature of the constitution, which is manifested in its diverse provisions, cannot be attacked, as it is not evident in a specific Article of the

Constitution.

10. The challenges to executive or legislative measures based on violation of the twin concepts of separation of powers and independence of the

judiciary have to be seen in terms of their impacts, not at one point in time, but cumulatively, over a time continuum. This idea was expressed in

Pareena Swarup v. Union of India (2008) 14 SCC 107 where the court observed that:

Ã¢â‚¬Å“9. It is necessary that the court may draw a line which the executive may not cross in their misguided desire to take over bit by bit and

(sic) judicial functions and powers of the State exercised by the duly constituted courts. While creating new avenue of judicial forums, it is

the duty of the Government to see that they are not in breach of basic constitutional scheme of separation of powers and independence of

the judicial function. We agree with the apprehension of the petitioner that the provisions of the Prevention of Money-Laundering Act are

so provided that there may not be independent judiciary to decide the cases under the Act but the members and the Chairperson to be

selected by the Selection Committee headed by Revenue Secretary.

10. It is to be noted that this Court in L. Chandra Kumar v. Union of India [(1997) 3 SCC 261 : 1997 SCC (L&S) 577] has laid down that

the power of judicial review over legislative action vested in the High Courts under Article 226 as well as in this Court under Article 32 of

the Constitution is an integral and essential feature of the Constitution constituting part of its (sic basic) structure. The Constitution

guarantees free and independent judiciary and the constitutional scheme of separation of powers can be easily and seriously undermined,

if the legislatures were to divest the regular courts of their jurisdiction in all matters, and entrust the same to the newly created Tribunals

which are not entitled to protection similar to the constitutional protection afforded to the regular courts. The independence and impartiality

which are to be secured not only for the court but also for Tribunals and their members, though they do not belong to the Ã¢â‚¬Å“judicial

serviceÃ¢â‚¬ but are entrusted with judicial powers. The safeguards which ensure independence and impartiality are not for promoting

personal prestige of the functionary but for preserving and protecting the rights of the citizens and other persons who are subject to the

jurisdiction of the Tribunal and for ensuring that such Tribunal will be able to command the confidence of the public. Freedom from control

and potential domination of the executive are necessary preconditions for the independence and impartiality of Judges. To make it clear

that a judiciary free from control by the executive and legislature is essential if there is a right to have claims decided by Judges who are

free from potential domination by other branches of Government. With this background, let us consider the defects pointed out by the

petitioner and amended/proposed provisions of the Act and the Rules.Ã¢â‚¬â€‹

11. The decision in S.P. Sampath Kumar v. Union of India & Ors. 1987 SCC Supp. 734 upheld the validity of the Administrative Tribunals Act, 1985

and the exclusion of High CourtsÃ¢â‚¬â„¢ jurisdiction under Article 226 of the Constitution (based on an enabling clause in Article 323A); yet, the

reasoning in the judgments delivered are a clear indicator that this court would always be careful in considering the efficacy of the body and its ability

to administer justice in a fair and impartial manner, having regard to the qualifications and experience of its personnel as well as the safeguards of

tenure, salary etc. L. Chandra Kumar v. Union of India & Ors (1997) 3 SCC 261,a seven-judge decision, decisively overruled Sampath Kumar (supra)

with respect to the preclusion of jurisdiction of Article 226 of the Constitution; this Court also declared that judicial review is a part of the basic

structure of the Constitution. In the next phase, where amendments were proposed to the Companies Act, 1956 to set up a National Company Law

Tribunal, this Court, by the Constitution Bench decision in Union of India v. R. Gandhi (2010) 11 SCC 1 again found several provisions of enacted

Parliamentary law to be objectionable Ã¢â‚¬" they are related to tenure, manner of appointment, qualifications of members etc. Likewise, in Madras Bar

Association v Union of India (MBA-I) (supra), the complete divesting of High CourtsÃ¢â‚¬â„¢ jurisdiction under tax enactments (income tax, customs,

central excise and service tax etc) and parliamentary setting up of a National Tax Court was held to be unconstitutional. Here again, the court

highlighted the quality of justice expected from such bodies and underlined that the divestment of such jurisdiction was prohibited by the Constitution.

Madras Bar Association (2015) 8 SCC 583 (Ã¢â‚¬Å“MBA-IIÃ¢â‚¬) considered the amended provisions of the Companies Act and proceeded to pronounce

that many of them could not pass muster of the Constitution. Once again, as in R. Gandhi (supra), this court was concerned with the likely impact on

the nature of the justice delivery mechanism envisioned by the new law. The method of appointment, qualifications, eligibility conditions and tenure of

all these fell within the undoubted domain of parliamentary concern. Yet, this court held that many of these policy decisions enacted into law were

contrary to the principle of an independent judiciary which could guarantee effective and impartial justice. Roger Mathew (2020) 6 SCC 1 held that

the rules framed under the Finance Act, 2017 (Ã¢â‚¬Å“the 2017 RulesÃ¢â‚¬) were not sustainable due to defects in the constitution of selection cum

appointment committees and tenure of members of tribunals, among other aspects. Madras Bar Association v. Union of India 2020 SCC OnLine SC

962 (Ã¢â‚¬Å“MBA-IIIÃ¢â‚¬) held that rules framed in 2020 were invalid as regards the tenure of members of tribunals, constitution of the mechanism for

their selection, lack of any substantive rules for their re-appointment, etc.

12. In all these decisions, this courtÃ¢â‚¬â„¢s scrutiny was based upon its role as the guardian of the constitution and, more specifically, independence of

the judiciary. If one were asked to pinpoint any specific provision of the constitution that this court relied upon while holding the enacted provisions to

be falling afoul of, there would be none. It is too late now to contend that independence of the judiciary and separation of powers are vague concepts

based on which Parliamentary re-enactment cannot be invalidated.

13. The role of this court in considering whether or not provisions of law or executive policies are in consonance with the Constitution is well

recognized and cannot be overemphasized. The Attorney GeneralÃ¢â‚¬â„¢s assertion that the executive or indeed the Parliament acts within its rights in

interpreting the Constitution, and therefore this court should adopt a deferential standard in matters of policy are therefore insubstantial, and also

disquieting. As conceded by the Union, if a law (passed validly in exercise of its exclusive power by the Parliament on its interpretation of the

Constitution) violates any express provision or principle that lies at the core of any express provision or provisions, this CourtÃ¢â‚¬â„¢s voice is decisive

and final.

14. Pertinently, in matters of independence of the judiciary or arrangement of courts or tribunals, when these provisions come up for interpretation, this

court would apply a searching scrutiny standard in its judicial review to ensure that the new body, court, tribunal, commission or authority created to

adjudicate (between citizens and government agencies or departments, citizens and citizens, or citizens and corporate entities) are efficient, efficacious

and inspire public confidence. The role of courts in considering a provision of law setting up adjudicatory bodies, was recognized in R.K. Jain v. Union

of India 1993 (3) SCR 802 in the following terms:

Ã¢â‚¬Å“The faith of the people is the bed- rock on which the edifice of judicial review and efficacy of the adjudication are founded. The

alternative arrangement must, therefore, be effective and efficient. For inspiring confidence and trust in the litigant public they must have

an assurance that the person deciding their causes is totally and completely free from the influence or pressure from the Govt. To maintain

independence and impartiality it, is necessary that the personnel should have at least modicum of legal training, learning and experience.

Selection of competent and proper people instil people's faith and trust in the office and help to build up reputation and acceptability.

Judicial independence which is essential and imperative is secured and independent and impartial administration of justice is assured.

Absence thereof only may get both law and procedure wronged and wrongheaded views of the facts and may likely to give rise to nursing

grievance of injustice. Therefore, functional fitness, experience at the liar and aptitudinal approach are fundamental for efficient judicial

adjudication. Then only as a repository of the confidence. as its duty, the tribunal would properly and efficiently interpret the law and

apply the law to the given set of facts. Absence thereof would be repugnant or derogatory to the constitution. The daily practice in the

courts not only gives training to Advocates to interpret the rules but also adopt the conventions of courts. In built experience would play

vital role in the administration of justice and strengthen and develop the qualities, of intellect and character, forbearance and patience,

temper and resilience which are very important in the practice of law. Practising Advocates from the Bar generally do endow with those

qualities to discharge judicial functions. Specialised nature of work gives them added advantage and gives benefit to broaden the

perspectives. ""Judges "" by David Pannick (1987 Edition), at page 50, stated that, ""we would not allow a man to perform a surgical

operation without a thorough training and certification of fitness. Why not require as much of a trial judge who daily operates on the lives

and fortunes of others"".

15. It would be useful to notice that whenever Parliament creates tribunals with exclusive jurisdiction, the parent enactment or law invariably bars the

jurisdiction of ordinary civil courts. [Section 293, Income Tax Act; Section 20A of the Securities and Exchange Board of India Act, 1992; Section 18,

the Recovery of Debts and Bankruptcy Act, 1993; Section 34 of the Securitisation and Reconstruction of Financial Assets and Enforcement of

Security Interest Act, 2002;Section 268, Companies Act, 2013; Section 231 of the Insolvency and Bankruptcy Code, 2016; Section 56, Petroleum and

Natural Gas Regulatory Board Act, 2006; Section 154, Electricity Act, 2003; Section 27 of the Telecom Regulatory Authority of India Act, 1997;

Section 61 of the Competition Act, 2002.] This in my opinion is the clearest indicator of the fact that but for such provisions and the creation of such

exclusive bodies, civil courts would of necessity have enjoyed jurisdiction to adjudicate disputes arising out of such new legislation [Section 9 of the

Civil Procedure Code]. This underscores the fact that the appropriate legislature wishes those disputes arising from such new legislation not to be

adjudicated by civil courts: which otherwise would have possessed jurisdiction over them. Such disputes may include issues such as refund of excess

amounts claimed as tax, private disputes between two licensees under a statutory regime such as telecom or electricity laws etc., consumer disputes,

liability to banks and financial institutions, and so on.

16. Parliament has, over the years, created several tribunals and commissions which exercise judicial functions that would ordinarily fall within the

jurisdiction of courts; they would also have been subjected to the supervisory jurisdiction of High Courts under Article 227. This gradual Ã¢â‚¬Å“hiving

offÃ¢â‚¬ of jurisdiction from the courts, therefore, calls for a careful and searching scrutiny to ensure that those who approach these bodies are assured

of the same kind and quality of justice, infused with what citizens expect from courts, i.e., independence, fairness, impartiality, professionalism and

public confidence. These considerations are relevant, given that Ã¢â‚¬Å“policyÃ¢â‚¬ choices adopted by the executive or legislature in the past, when it

concerned dispensation of justice through courts, were the subject matter of scrutiny under judicial review by courts.

17. In the exercise of such judicial review, in the past, this court has ruled that High Courts have a decisive say in matters of recruitment, promotion

and conditions of services of judges of District and other courts, although the Constitution only requires the Governor to consult that institution (High

Courts). In Chandra Mohan v. State of U.P 1967 (1) SCR 77, this court unanimously held:

Ã¢â‚¬Å“The exercise of the power of appointment by the Governor is conditioned by his consultation with the High Court, that is to say, he can

only appoint a person to the post of District Judge in consultation with the High Court. The object of consultation is apparent. The High

Court is expected to know better than the Governor in regard to the suitability or otherwise of a person, belonging either to the Ã¢â‚¬Å“Judicial

ServiceÃ¢â‚¬ or to the Bar, to be appointed as a District Judge. Therefore, a duty is enjoined on the Governor to make the appointment in

consultation with a body which is the appropriate authority to give advice to him.... These provisions indicate that the duty to consult is so

integrated with the exercise of the power that the power can be exercised only in consultation with the person or persons designated

therein.Ã¢â‚¬â€‹

To the same effect are the decisions in Chandramouleshwar Prasad v. Patna High Court(1969) 3 SCC 56 And many other judgments. [State of

Kerala v. A. Lakshmikutty and Ors. 1987 (1) SCR136 where the court emphasized that the Constitution required the Governor to have a Ã¢â‚¬Å“ real, full

and effective consultationÃ¢â‚¬ with the High Court in the matter of appointment of District judges; M.M. Gupta and Ors. v. State of Jammu and

Kashmir & Ors (1982) 3 SCC 412] In State of Bihar v Bal Mukund Sah (2004) 4 SCC 640 it was held that:

Ã¢â‚¬Å“the framers of the Constitution separately dealt with Judicial Services of the State and made exclusive provisions regarding recruitment

to the posts of District Judges and other civil judicial posts inferior to the posts of the District Judge. Thus these provisions found entirely in

a different part of the Constitution stand on their own and quite independent of part XIV dealing with Services in general under the State.

Therefore, Article 309, which, on its express terms, is made subject to other provisions of the Constitution, does get circumscribed to the

extent to which from its general field of operation is carved out a separate and exclusive field for operation by the relevant provisions of

Articles dealing with Subordinate Judiciary as found in Chapter VI of Part VI of the Constitution.Ã¢â‚¬â€‹

18. This court, therefore, as the ultimate guardian of the Constitution, and the rule of law, which it is sworn to uphold, has been asserting its role in

regard to matters of appointment, and other conditions of service of judges of district and other courts. Since tribunals function within the larger

ecosystem of administration of justice, and essentially discharge judicial functions, this court is equally concerned with the qualifications, eligibility for

appointment, procedure for selection and appointment, conditions of service, etc of their members. This courtÃ¢â‚¬â„¢s concern, therefore, is unlike any

other subject matter of judicial review. It cannot be gainsaid that if tenures of tribunalsÃ¢â‚¬â„¢ members are short: say two years, or if their salaries are

pegged at unrealistically low levels, or if their presiding members are given no administrative control or powers, the objective of efficient, fair, and

impartial justice delivery would be defeated. It cannot then be argued that each of these are Ã¢â‚¬Å“policyÃ¢â‚¬â€‹ matters beyond the courtÃ¢â‚¬â„¢s domain.

19. Ordinarily in pure Ã¢â‚¬Å“policyÃ¢â‚¬ matters falling within Parliamentary or executive domain, such as economic, commercial, financial policies, or other

areas such as energy, natural resources etc, this courtÃ¢â‚¬â„¢s standard of judicial review is deferential. In almost all subject matters over which

legislative bodies enact law, the wisdom of the policy is rarely questioned; it is too well recognised that in such matters, judicial review extends to

issues concerning liberties of citizens, and further, whether the particular subject matter falls within the legislative field of the concerned legislative

body. In matters where the executive implements those laws, the scrutiny extends to further seeing the legality and constitutionality of such action.

Where there is no law, the court considers whether executive competence to act is traceable to the particular legislative field under the Constitution,

and whether the executive action sans law, abridges peopleÃ¢â‚¬â„¢s liberties. Deference to matters executive appears to be highest, when the country

faces emergencies and existential threats. However, in matters that concern administration of justice, especially where alternative adjudicatory forums

are created, the courtÃ¢â‚¬â„¢s concern is greater. This is because the Constitution does not and cannot be read so as to provide two kinds of justice: one

through courts, and one through other bodies. The quality and efficacy of these justice delivery mechanisms have to be the same, i.e., the same as that

provided by courts, as increasingly, tribunals adjudicate disputes not only between state agencies and citizens, but also between citizens and citizens as

well as citizens and powerful corporate entities. Therefore, it is the Ã¢â‚¬Å“equal protectionÃ¢â‚¬ of laws [Under Article 14 of the Constitution of India],

guaranteed to all persons, through institutions that assure the same competence of its personnel, the same fair procedure, and the same independence

of adjudicators as is available in existing courts, that stands directly implicated. Consequently, when this court scrutinizes any law or measure dealing

with a new adjudicatory mechanism, it is through the equal protection of law clause under Article 14 of the Constitution.

20. With these observations, I proceed to deal with the minimum age requirement (hereafter called Ã¢â‚¬Å“age qualificationÃ¢â‚¬) which precludes otherwise

qualified candidates possessing the requisite experience from appointment to all tribunals, unless they are 50 years of age or older. This age

qualification is that candidates, to be appointed, should not be less than 50 years, and has been introduced by the first proviso to Section 184 (1) of the

Finance Act. What is immediately noticeable is that this age qualification (more by way of an age bar or minimum age requirement) did not find place

in any parent enactment [Income Tax Act, 1961, Customs Act, 1962, Securities Exchange of India Act, 1992, Electricity Act, 2003, etc.], which set

out the eligibility conditions for appointments to various tribunals, with the exception of appointment as members to the National Company Law

Tribunal, for which, candidates should have completed 50 years to be eligible for appointment, apart from the prescribed eligibility and condition

criteria. Such age criteria was not enacted under the provisions of the Finance Act, 2017; nor was it introduced in the 2017 Rules (which were

invalidated by Rojer Mathew). An indirect age barrier, for the first time was introduced in the 2020 Rules framed under the Finance Act, 2017, in the

form of the requirement of otherwise qualified advocates and chartered accountant candidates having to possess 25 years of practice. This court held

that requirement to be untenable, and directed it to be suitably amended. In response, as it were, for the first time, the 50-year minimum age

requirement has been enacted in the parent enactment (Finance Act, 2017) through amendment by the impugned Ordinance. The justification given

for this age requirement or qualification is threefold:

(a) Advocate members, technical members (including chartered accountants) and those joining the tribunal as departmental members would have a

uniform age, which is relatable to the approximate age by which a public servant attains the status and rank of Additional Secretary, which enables

consideration of her or his name for appointment as member of a tribunal;

(b) Considerations of equivalence with Additional Secretaries, weighed with the Union in enacting the age qualification;

(c) Whether the minimum age of a tribunal member ought to be 50 years, or less, is within the exclusive domain of the executive, and Parliament and

cannot be dependent upon the views of this court, being a pure policy issue.

21. The challenge to the first proviso to Section 184, which prescribes the age qualification, has to be seen from several angles. First, the underlying

parent statutes which created the tribunals (ITAT, CESTAT, TDSAT, CAT) did not pre-scribe, as an eligibility criterion for selection of candidates as

members, any mini-mum age. The prescription of 50 years as a minimum eligibility criterion, in the opinion of this court, is without any rationale. The

ITAT has existed for the last 79 years; no less than 33 of its members were appointed as judges of various High Courts; one of them (Ranganathan,

J.) was appointed to this court. The CESTAT too has comprised advocates who have staffed the tribunal efficiently. The absence of any explanation

for the preference given to older persons, in fact leads to an ab-surd result- as was pointed out in MBA-III and as has been reiterated by L.

Nageswara Rao, J. in his opinion. The Constitution of India makes an advocate who has practiced for more than 10 years, eligible for consideration

for appoint-ment as a judge of the High Court and even this Court. An advocate with 7 yearsÃ¢â‚¬â„¢ practice with the Bar can be considered for

appointment to the position of a Dis-trict Judge. Prescribing 50 years as a minimum age limit for consideration of ad-vocates has the devastating effect

of entirely excluding successful young advo-cates, especially those who might be trained and competent in the particular subject (such as Indirect

Taxation, Anti-Dumping, Income-Tax, International Taxation and Telecom Regulation). The exclusion of such eligible candidates in preference to

those who are more than 50 years of age is inexplicable and therefore entirely arbi-trary. As this Court in its previous judgment (Rojer Mathew) has

pointed out in an-other context, the exclusion of such young and energetic legal practitioners could result in not so efficient or competent practitioners

left in a field for consideration which would have telling effects on the quality of decisions they are likely to ren-der.

22. Prescribing 50 yearsÃ¢â‚¬â„¢ minimum age as a condition for appointment to these tribunals is arbitrary also because absolutely no reason is

forthcoming about what impelled Parliament to divert from the long-established criteria of giving weigh-tage to actual practice, reputation, integrity and

subject expertise, without a mini-mum age criterion, in the pleadings in this case, nor in any other cases (R. Gandhi Ã¢â‚¬"MBA Ã¢â‚¬"I; Madras Bar

Association Ã¢â‚¬"III and Roger Mathew). Such being the case, it is astonishing that in the span of a year (i.e. after the decision in Roger Mathew)

Ã¢â‚¬Å“new thinkingÃ¢â‚¬ seems to have prevailed to frame rules excluding advo-cates who can otherwise, based on their expertise, be considered for

appointment to even High Courts.

23. This Court would also observe that the consideration of such younger advo-cates in the age group of 40-45 years would have long term benefits

since the do-main knowledge and expertise in such areas (Telecom Regulation, Taxation Ã¢â‚¬"both Direct and Indirect, GATT Rules, International

Taxation etc.) would be useful in adjudication in these tribunals and lead to a body of jurisprudence. Depending on how such counsel/advocates fare

as members of the Tribunal, having regard to their special knowledge of these laws, at a later and appropriate stage, they may even be considered for

appointment to High Courts.

24. The age criteria, impugned in this case also leads to wholly anomalous and absurd results. For instance, an advocate with 18- or 20-yearsÃ¢â‚¬â„¢

practice, aged 44 years, with expertise in the field of indirect taxation, telecom, or other regulatory laws, would be conversant with the subject matter.

Despite being eligible, (as she or he would fulfil the parameters of at least 10 yearsÃ¢â‚¬â„¢ practice, in the light of the decision in MBA-III) such a

candidate would be excluded. On the other hand, an individual who might have practiced law for 10 years, and later served as a private or public

sector executive in an entirely unrelated field, but who might be 50 years of age, would be considered eligible, and can possibly secure appointment as

a member of a tribunal. Thus, the age criterion would result in filtering out candi-dates with more relevant experience and qualifications, in preference

to those with lesser relevant experience, only on the ground of age.

25. In the decision reported as State of J&K v. Triloki Nath Khosa (1974) 1 SCC 19, this court explained that a classification for the purpose of

Article 14 of the Constitution (as the present minimum age criteria undoubtedly is, in the present case) based on any criteria, must be based on a

distinct characteristic, having a rational nexus with the object of the norm, or the law:

Ã¢â‚¬Å“31. Classification, however, is fraught with the danger that it may produce artificial inequalities and therefore, the right to classify is

hedged in with salient restraints; or else, the guarantee of equality will be submerged in class legislation masquerading as laws meant to

govern well marked classes characterized by different and distinct attainments. Classification, therefore, must be truly founded on

substantial differences which distinguish persons grouped together from those left out of the group and such differential attributes must

bear a just and rational relation to the object sought to be achieved.Ã¢â‚¬â€‹

26. Similarly, in Mohd. Shujat Ali v. Union of India 1975 (3) SCC 76 this Court cautioned against over-classification, based on artificial distinctions

between two categories falling within the same class, in matters of public employment:

Ã¢â‚¬Å“To permit discrimination based on educational attainments not obligated by the nature of the duties of the higher post is to stifle the

social thrust of the equality clause. A rule of promotion which, while conceding that non-graduate Supervisors are also fit to be promoted

as Assistant Engineers, reserves a higher quota of vacancies for promotion for graduate Supervisors as against non-graduate Supervisors,

would clearly be calculated to destroy the guarantee of equal opportunity.Ã¢â‚¬â€‹

27. Given that the essential educational qualifications and experience in the relevant field are fixed for all candidates, for a classification based on

minimum age for appointment (like in the present case) to succeed, the Union cannot say that it should be held to be valid, irrespective of the nature

and purposes of the classification or the quality and extent of the difference in experience between candidates. As between someone with 18

yearsÃ¢â‚¬â„¢ experience but aged 42 or 43 years, and someone with only 12 yearsÃ¢â‚¬â„¢ experience, if a system of weightage for experience and

qualification were to be applied, the one with greater experience would in all likelihood be selected. Then, to say that one with lesser experience, but

who is more aged should be selected and appointed, not only eliminating the one with more experience, but even disqualifying her or him, would mean

that better candidates have to be overlooked and those with lesser experience would be appointed, solely on the ground that the latter is over 50 years

of age. Prime Minister Jawaharlal Nehru, in the course of the Constituent Assembly debates, (though in the context of fixing age of retirement of

judges) remarked that [CAD, Vol. VIII dated 24th May, 1949]

Ã¢â‚¬Å“But the fact is, when you reach certain top grades where you require absolutely first-class personnel, then it is a dangerous thing to fix

a limit which might exclude these first-rate men.Ã¢â‚¬â€‹

In the present case, the rule has the effect of excluding deserving candidates, without subserving any discernible public policy or goal. Thus, the

classification is based on no justifiable rationale; nor can it be said that the age criterion has some nexus with the object sought to be achieved, such as

greater efficiency or experience.

28. In Anuj Garg v. Hotel Assn. of India (2008) 3 SCC 1. one of the issues was the bar to employment of anyone less than 25 years of age in the

hotel industry. This court held that such age discrimination was unsustainable, and struck it down, observing as follows:

Ã¢â‚¬Å“25. Hotel management has opened up a vista for young men and women for employment. A large number of them are taking hotel

management graduation courses. They pass their examinations at a very young age. If prohibition in employment of women and men below

25 years is to be implemented in its letter and spirit, a large section of young graduates who have spent a lot of time, money and energy in

obtaining the degree or diploma in hotel management would be deprived of their right of employment. Right to be considered for

employment subject to just exceptions is recognised by Article 16 of the Constitution. Right of employment itself may not be a fundamental

right but in terms of both Articles 14 and 16 of the Constitution of India, each person similarly situated has a fundamental right to be

considered therefor.

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56. Young men who take a degree or diploma in hotel management enter into service at the age of 22 years or 23 years. It, thus, cannot

prohibit employment of men below 25 years. Such a restriction keeping in view a citizen's right to be considered for employment, which is a

facet of the right to livelihood does not stand judicial scrutiny.Ã¢â‚¬â€‹

29. In this courtÃ¢â‚¬â„¢s decision in Lt. Col. Nitisha & Ors. v. Union of India 2021 SCCOnLine SC 261, a refer-ence was made to a US statute - the

Age Discrimination in Employment Act, 1967 and the US Supreme Court decision in Smith v. City of Jackson 544 US 228 (2005) which dealt with

discrimination based on age. The relevant provisions of the said enactment proscribe age discrimination in regard to matters of employment. A recent

US Supreme Court decision Baab v. Wilke No. 18-882, 589 U. S. ____ (2020) explained what is meant by age discrimination, in the following terms:

The relevant provisions of the Age Discrimination in Employment Act, 1967, Sec 623 (Section 4) are as follows:

Ã¢â‚¬Å“(a) Employer practices

It shall be unlawful for an employer-

(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation,

terms, conditions, or privileges of employment, because of such individual's age;

(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment

opportunities or otherwise adversely affect his status as an employee, because of such individual's age; or

(3) to reduce the wage rate of any employee in order to comply with this chapter.

(b) It shall be unlawful for an employment agency to fail or refuse to refer for employment, or otherwise to discriminate against, any

individual because of such individual's age, or to classify or refer for employment any individual on the basis of such individual's ageÃ¢â‚¬Â¦.Ã¢â‚¬â€‹

Ã¢â‚¬Å“The Civil Service Reform Act of 1978, which governs federal employment, broadly defines a Ã¢â‚¬Å“personnel actionÃ¢â‚¬ to include most

employment-related decisions, such as appointment, promotion, work assignment, compensation, and performance reviews. See 5 U. S. C.

Ã‚Â§2302(a)(2)(A). That interpretation is consistent with the termÃ¢â‚¬â„¢s meaning in general usage, and we assume that it has the same meaning

under the ADEA. Under Ã‚Â§633a(a), personnel actions must be made Ã¢â‚¬Å“free fromÃ¢â‚¬ discrimination. The phrase Ã¢â‚¬Å“free fromÃ¢â‚¬ means

Ã¢â‚¬Å“[c]lear of (something which is regarded as objectionable).Ã¢â‚¬ WebsterÃ¢â‚¬â„¢s Third New International Dictionary 905 (def. 4(a)(2))

(1976); 4 Oxford English Dictionary 521 (def. 12) (1933); see also American Heritage Dictionary 524 (def. 5(a)) (1969) (defining

Ã¢â‚¬Å“freeÃ¢â‚¬ Ã¢â‚¬Å“used with fromÃ¢â‚¬ as Ã¢â‚¬Å“[n]ot affected or restricted by a given condition or circumstanceÃ¢â‚¬); Random House Dictionary of

the English Language 565 (def. 12) (1966) (defining Ã¢â‚¬Å“freeÃ¢â‚¬ as Ã¢â‚¬Å“exempt or released from something specified that controls, restrains,

burdens, etc.Ã¢â‚¬). Thus, under Ã‚Â§633a(a), a personnel action must be made Ã¢â‚¬Å“untaintedÃ¢â‚¬ by discrimination based on age, and the

addition of the term Ã¢â‚¬Å“anyÃ¢â‚¬ (Ã¢â‚¬Å“free from any discrimination based on ageÃ¢â‚¬) drives the point home. And as for Ã¢â‚¬Å“discrimination,Ã¢â‚¬

we assume that it carries its Ã¢â‚¬Å“Ã¢â‚¬Ëœnormal definition,Ã¢â‚¬â„¢Ã¢â‚¬ which is Ã¢â‚¬Å“Ã¢â‚¬Ëœdifferential treatment.Ã¢â‚¬â„¢Ã¢â‚¬ Jackson v. Birmingham Bd. of

Ed., 544 U. S. 167, 174 (2005). Under Ã‚Â§633a(a), the type of discrimination forbidden is Ã¢â‚¬Å“discrimination based on age,Ã¢â‚¬ and Ã¢â‚¬Å“[i]n

common talk, the phrase Ã¢â‚¬Ëœbased onÃ¢â‚¬â„¢ indicates a but-for causal relationship.Ã¢â‚¬ Safeco Ins. Co. of America v. Burr, 551 U. S. 47, 63

(2007); cf. Comcast Corp. v. National Assn. of African American Owned Media, ante, at 6. Therefore, Ã‚Â§633a(a) requires that age be a but-

for cause of the discrimination alleged. What remains is the phrase Ã¢â‚¬Å“shall be made.Ã¢â‚¬ Ã¢â‚¬Å“[S]hall be madeÃ¢â‚¬ is a form of the verb Ã¢â‚¬Å“to

make,Ã¢â‚¬ which means Ã¢â‚¬Å“to bring into existence,Ã¢â‚¬ Ã¢â‚¬Å“to produce,Ã¢â‚¬ Ã¢â‚¬Å“to render,Ã¢â‚¬ and Ã¢â‚¬Å“to cause to be or become.Ã¢â‚¬ Random

House Dictionary of the English Language, at 866. Thus, Ã¢â‚¬Å“shall be madeÃ¢â‚¬ means Ã¢â‚¬Å“shall be produced,Ã¢â‚¬ etc. And the imperative

mood, denoting a duty, see BlackÃ¢â‚¬â„¢s Law Dictionary 1233 (5th ed. 1979), emphasizes the importance of avoiding the taint. So much for

the individual terms used in Ã‚Â§633a(a). What really matters for present purposes is the way these terms relate to each other. Two matters of

syntax are critical. First, Ã¢â‚¬Å“based on ageÃ¢â‚¬ is an adjectival phrase that modifies the noun Ã¢â‚¬Å“discrimination.Ã¢â‚¬ It does not modify

Ã¢â‚¬Å“personnel actions.Ã¢â‚¬ The statute does not say that Ã¢â‚¬Å“it is unlawful to take personnel actions that are based on ageÃ¢â‚¬; it says that

Ã¢â‚¬Å“personnel actions . . . age must be a but- for cause of discriminationÃ¢â‚¬"that is, of differential treatmentÃ¢â‚¬" but not necessarily a but-

for cause of a personnel action itself. Second, Ã¢â‚¬Å“free from any discriminationÃ¢â‚¬â€‹ is an adverbial phrase that modifies the verb Ã¢â‚¬Å“made.Ã¢â‚¬â€‹

Ibid. Thus, Ã¢â‚¬Å“free from any discriminationÃ¢â‚¬â€‹ describes how a personnel action must be Ã¢â‚¬Å“made,Ã¢â‚¬â€‹ namely, in a way that is not tainted by

differential treatment based on age. If age discrimination plays any part in the way a decision is made, then the decision is not made in a

way that is untainted by such discrimination. This is the straightforward meaning of the terms of Ã‚Â§633a(a), and it indicates that the statute

does not require proof that an employment decision would have turned out differently if age had not been taken into account.Ã¢â‚¬â€‹

(emphasis supplied)

30. The Delhi High Court, in its decision reported as Commissioner, M.C.D. v. Shashi (2009) 165 DLT 17 invalidated a rule that allowed the public

employer to screen candidates based on their age, emphasizing that:

Ã¢â‚¬Å“Subject to constitutionally permissible reservations, every endeavour must be made by the State to employ or engage the most qualified

or the most meritorious persons. In doing so, the State may fix shortlisting criteria on the basis of educational qualifications or experience

or marks obtained in an examination or an interview or any other criterion which enables the most competent person to be selected.

Unfortunately, age has nothing to do either with merit or competence. Wisdom may be an attribute of age, but not merit or competence.

13. There is not even an iota of material to suggest, nor indeed has anything been pointed out by learned Counsel for the Petitioner, that

merely because an applicant falls within the age group of 28 to 30 years he is better qualified as a teacher than a person falling in the age

group of 18 to 27 years. It is not the case of the Petitioner that persons in the age group of 28 to 30 years are either better qualified

educationally or have more experience or are in any manner more meritorious or competent than the applicants falling within the age group

of 18 to 27 years solely because of their age. It seems to us that the Petitioner has literally picked the age group of 28 to 30 years out of the

hat (as it were) without any reference to any logical or empirical basisÃ¢â‚¬â€‹

31. In the present case, therefore, the qualification of a minimum age of 50 years as essential for appointment, is discriminatory because it is neither

shown to have a rational nexus with the object sought to be achieved, i.e. appointing the most meritorious candidates; nor is it shown to be based on

any empirical study or data that such older candidates fare better, or that younger candidates with more relevant experience would not be as good, as

members of tribunals. It is plain and simple, discrimination based on age. The criterion (of minimum 50 years of age) is virtually Ã¢â‚¬Å“picked out from a

hatÃ¢â‚¬ [An expression used in an analogous context, while declaring a cut-off date to be arbitrary, in D.R. Nim v Union of India 1967 (2) SCR 325.]

and wholly arbitrary.

32. As stated earlier, the tribunals which were reorganized by the Finance Act, 2017 and now, through the impugned ordinance, exercise judicial

functions of the State, interpret and enforce the law, in the course of adjudication of disputes. As repeatedly emphasized by this court in previous

Constitution Bench judgments, appointment of members (of such tribunals), their conditions of service, manner of selection, remuneration and security

of tenure are vital to their efficiency and independent functioning. It is in this backdrop that the UnionÃ¢â‚¬â„¢s contention regarding Ã¢â‚¬Å“equivalenceÃ¢â‚¬ or

Ã¢â‚¬Å“parityÃ¢â‚¬ with members of the civil services of the Union or holders of civil posts under the Union, as a justification for the age criterion, needs to

be examined.

33. This Court in All India Judges' Assn. (II) v. Union of India (1993) 4 SCC 288., held that:

Ã¢â‚¬Å“9. So much for the contention of the review petitioners that the directions given by this Court would lead to the demand from the

members of the other services for similar service conditions. It is high time that all concerned appreciated that for the reasons pointed out

above there cannot be any link between the service conditions of the Judges and those of the members of the other services. It is true that

under Article 309 of the Constitution, the recruitment and conditions of service of the members of the subordinate judiciary are to be

regulated by the Acts of the appropriate legislature and pending such legislation, the President and the Governor or their nominees, as the

case may be, are empowered to make rules regulating their recruitment and the conditions of service. It is also true that after the Council of

States makes the necessary declaration under Article 312, it is the Parliament which is empowered to create an All India Judicial Service

which will include posts not inferior to the post of District Judge as defined under Article 236. However, this does not mean that while

determining the service conditions of the members of the judiciary, a distinction should not be made between them and the members of the

other services or that the service conditions of the members of all the services should be the same. As it is, even among the other services, a

distinction is drawn in the matter of their service conditions. This Court has in the judgment under review, pointed out that the linkage

between the service conditions of the judiciary and that of the administrative executive was an historical accident. The erstwhile rulers

constituted, only one service, viz., the Indian Civil Service for recruiting candidates for the judicial as well as the administrative service and

it is from among the successful candidates in the examination held for such recruitment, that some were sent to the administrative side while

others to the judicial side. Initially, there was also no clear demarcation between the judicial and executive services and the same officers

used to perform judicial and executive functions. Since the then Government had failed to make the distinction between the two services

right from the stage of the recruitment, its logical consequences in terms of the service conditions could not be avoided. With the

inauguration of the Constitution and the separation of the State power distributed among the three branches, the continuation of the

linkage has become anachronistic and is inconsistent with the constitutional provisions.

As pointed out earlier, the parity in status is no longer between the judiciary and the administrative executive but between the judiciary and

the political executive. Under the Constitution, the judiciary is above the administrative executive and any attempt to place it on a par with

the administrative executive has to be discouraged. The failure to grasp this simple truth is responsible for the contention that the service

conditions of the judiciary must be comparable to those of the administrative executive and any amelioration in the service conditions of the

former must necessarily lead to the comparable improvement in the service conditions of the latter.Ã¢â‚¬‹

34. In addition, it is worthwhile to recollect that a civil servantÃ¢â‚¬â„¢s experience, though varied and diverse Ã¢â‚¬" ranging from co-ordination and

administration at taluk, district and state levels, to devising, framing and implementing the governmentÃ¢â‚¬â„¢s policies and programmes, to managing

statutory corporations and even commercial enterprises of the state, does not always entail adjudicatory functions. However, legal practitioners,

chartered accountants and one segment of civil servants, i.e. tax administrators and adjudicators are involved in the day to day interpretation of law,

leading to adjudicatory outcomes. Such being the case, the equivalence of Ã¢â‚¬Å“statusÃ¢â‚¬ of members of tribunals cannot be compared in a linear or rigid

manner. That according to the UnionÃ¢â‚¬â„¢s scheme of rules and regulations, members of its services can attain a certain rank upon attaining the age

of, say, 50 years, therefore, cannot be determinative. In any case, the argument of equivalence is not relevant. This point too, was brought home in the

judgment of this court, in All India Judges Association II (supra):

Ã¢â‚¬Å“Unlike the administrative officer, the judicial officer is obliged to work for long hours at home. When he reserves a judgment he has

usually to prepare the same at his residence. For that purpose, he has to read the records as also the judicial precedents cited by counsel

for the adversaries. Even otherwise with a view to keeping himself up to date about the legal position he has to read judgments of his own

High Court, other High Courts and of the Supreme Court. He has also to read legal journals.Ã¢â‚¬â€‹

35. There are other points of distinction too between civil servants and members of tribunals. Members of tribunals are not drawn from any civil

service; they are not holders of civil posts. Civil servants, especially members of the All-India Services recruited by the Union, some of whom are

deployed to different States, are governed by rules and other service conditions embodied in circulars and orders. These govern their entire universe of

employment: starting with eligibility conditions, rules for recruitment and selection, pay and allowances, seniority, promotion, discipline and other

matters related to misconduct, pension, terminal benefits etc. On the other hand, such rules or similar rules do not apply to members of tribunals not

drawn from public service. It is only conditions of equivalence such as pay scale which they are assured of under the rules, which also determine their

status. The manner of selection, conditions of eligibility, rules for their removal upon proven misbehaviour and so on, are entirely different from public

servants. In fact, the latter category, i.e. members of tribunals not drawn from public service sources, are not even holders of civil posts or members

of any encadred civil service. This has been clarified in at least two judgments of this court [State of Maharastra v Labour Law Practitioners

Association1998 (2) SCC 688]. They are not governed by Article 311 of the Constitution, nor are their conditions of service laid out in rules framed

under the proviso to Article 309 of the Constitution. Such being the position, the argument of parity, in the opinion of the Court, is entirely devoid of

merit. Nor is the argument of the Attorney General that a uniform age is necessary, merited. There is no material to show that members recruited on

the technical side, such as experts in engineering, scientific or other technical fields would be suitable only after they cross the age of 50. In fact, one

can complete a doctoral thesis and become a holder of a Ph.D at the time that she or he is 30 years or even below. To be a professor, one has to

possess 10 years teaching experience; there is no minimum age under the relevant regulations framed by the UGC. Even non-teaching personnel, on

the basis of their research, can be designated professors . As on date, there are vice-chancellors in some state and national universities who had not

completed 45 years at the time of appointment. Such being the position, experience in the field either in the academic, technical or scientific field for a

further period of 10 or 12 years or even 15 years would not add up to the minimum threshold of the impugned criteria, i.e. 50 years of age. Purely as

empirical data, the ITAT has a sanctioned strength of 126 members, (which includes accountant members, technical members Ã¢â‚¬" who are drawn

from the Indian Revenue Service holding the rank of Commissioner of Ap-peals, for 3 years, and advocates). 66 members presently are in office,

appointed since the year 1999. [https://itat.gov.in/page/content/members (last accessed on 21.06.2021).] Of these, 10 members were below the age of

40 at the time of their appointment; 20 members were between the ages of 40-45, and 15 mem-bers were between the ages of 46-50- at the time of

their respective appointments. Cumulatively, 44 members out of 66 were appointed below the age of 50. Only 17 members were 50 or above at the

time of their appointment. Data is not provided in respect of 5 members. This data- as indeed similar data from other tribunals, shows that past

appointment to these positions was amongst younger, and and competent persons. The Union has not shown why this past history requires departure,

and why that longstanding basis for appointing younger professionals, now needs to be departed from, in public interest. Significantly, commissioners of

appeals (of in-come tax) Ã¢â‚¬" in the respective service rules, typically are appointed after 18 or so years of service; if one adds 3 years, an incumbent

Commissioner could be well below 50 years. She or he would be completely familiar with the adjudicatory process in tax laws. Exclusion of such

otherwise qualified and suited personnel, too, is irrational. Having regard to all these reasons, the UnionÃ¢â‚¬â„¢s argument that 50 years is necessary as it

brings about parity between the members of the civil services who are eligible to be considered in their stream for tribunals or that there is an overall

uniformity, is without merit and accordingly rejected.

Ã¢â‚¬Å“Going by these tests laid down as to what constitutes judicial service under Article 236 of the Constitution, the Labour Court judges and

the judges of the Industrial Court can be held to belong to judicial service.Ã¢â‚¬â€‹

In S.D. Joshi v. High Court of Bombay, (2011) 1 SCC 252 the previous decision in Harinagar Sugar Mills v Shyam Sunder

Jhunjunuwala1962 (3) SCR 339 was quoted:

Ã¢â‚¬Å“Broadly speaking, certain special matters go before tribunals, and the residue goes before the ordinary courts of civil judicature. Their

procedures may differ, but the functions are not essentially different.Ã¢â‚¬â€‹

In Union of India v K.B. Khare1994 (3) SCC 502, this court repelled the contention that members of the Central Administrative Tribunals

were government officials, subject to its rules:

Ã¢â‚¬Å“On the contrary, an independent judicial service, the appointment in the CAT is on tenure basis. The pension relating to such post is

clearly governed by Rule 8 of the Rules quoted above and at the risk of repetition, we may state it exhaustive in nature.Ã¢â‚¬â€‹

UGC Regulations on Minimum qualifications for appointment of Teachers and other academic staff in Universities and Colleges and

measures for the Maintenance of Standards in Higher Education,20104.0.0 DIRECT RECRUITMENT

Ã¢â‚¬Å“4.1.0 PROFESSOR A. (i) An eminent scholar with Ph.D. qualification(s) in the concerned/allied/relevant discipline and published work

of high quality, actively engaged in research with evidence of published work with a minimum of 10 publications as books and/or

research/policy papers. (ii) A minimum of ten years of teaching experience in university/college, and/or experience in research at the

University/National level institutions/industries, including experience of guiding candidates for research at doctoral level. (iii) Contribution

to educational innovation, design of new curricula and courses, and technology Ã¢â‚¬" mediated teaching learning process. 6 (iv) A minimum

score as stipulated in the Academic Performance Indicator (API) based Performance Based Appraisal System (PBAS), set out in this

Regulation in Appendix III. OR

B. An outstanding professional, with established reputation in the relevant field, who has made significant contributions to the knowledge in

the concerned/allied/relevant discipline, to be substantiated by credentials.Ã¢â‚¬â€‹

https://www.ugc.ac.in/oldpdf/regulations/revised_finalugcregulationfinal10.pdf visited on 25 June, 2021 @ 16:18 hours.

36. A further, but crucial issue. In Madras Bar Association v Union of India 2020 SCCOnline (SC) 962 (MBA-III) this court held as unlawful the

exclusion of advocates from consideration in the following directions:

Ã¢â‚¬Å“53. The upshot of the above discussion leads this court to issue the following directions:

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(vi) The 2020 Rules shall be amended to make advocates with an experience of at least 10 years eligible for appointment as judicial

members in the Tribunals. While considering advocates for appointment as judicial members in the Tribunals, the Search-cum-Selection

Committee shall take into account the experience of the Advocate at the bar and their specialization in the relevant branches of law. They

shall be entitled for reappointment for at least one term by giving preference to the service rendered by them for the Tribunals.

(vii) The members of the Indian Legal Service shall be eligible for appointment as judicial members in the Tribunals, provided that they fulfil

the criteria applicable to advocates subject to suitability to be assessed by the Search-cum-Selection Committee on the basis of their

experience and knowledge in the specialized branch of law.Ã¢â‚¬â€‹

37. The Union of India had not made any move to give effect to the above directions. The declaration of law in MBA-III recorded in an earlier part of

the decision, that advocates in all tribunals are eligible for consideration for appointment as members of various tribunals. It is no longer open to

exclude such eligible advocates from consideration. The direction to the following effect is binding and has become final. It has not been interdicted in

any manner, by the impugned ordinance:

Ã¢â‚¬Å“Exclusion of Advocates in 10 out of 19 tribunals, for consideration as judicial members, is therefore, contrary to Union of India v.

Madras Bar Association (2010)19 and Madras Bar Association v. Union of India (2015)20. However, it is left open to the Search-cum-

Selection Committee to take into account in the experience of the Advocates at the bar and the specialization of the Advocates in the

relevant branch of law while considering them for appointment as judicial membersÃ¢â‚¬â€‹.

After hearings were concluded, the directions in MBA-III on the above score, were accepted, and Advocates have now been made eligible, for

appointment to 15 tribunals, after they complete 10 yearsÃ¢â‚¬â„¢ enrolment, and have relevant experience or in the concerned field of practice.

38. As a result of the above discussion, the proviso to Section 184 (1), inserted by the impugned ordinance is declared void. A declaration is issued that

all candidates, otherwise eligible on their merit, based on qualifications and experience in the relevant field, are entitled to be considered, without

reference to the impugned Ã¢â‚¬Å“minimumÃ¢â‚¬â€‹ age (of 50 years) criteria.

39. I am in agreement with the reasoning and conclusions of L. Nageswara Rao, J. about the impermissibility of legislative override, even while

upholding the retrospectivity accorded to Section 184 (11). In addition to the detailed reasons why such a legislative override is impermissible in the

circumstances of this case, I would also rely on the Constitution Bench judgment in State of Gujarat v. Raman Lal Keshav Lal Soni (1983) 2 SCC 33.

This Court, in Raman Lal dealt with the issue of retrospec-tive application of a provision of the Gujarat Panchayats Act, 1961. The facts per-tained to

denial of the benefits of two pay commissions to employees of Panchayat Institutions who had previously been employed by municipalities. The

legislative provision (Section 102(1)) was given retrospective effect, classifying these employees as servants of Gram/ Nagar Panchayats,

notwithstanding judgments of courts which had declared them to be Government servants, which would have en-titled them to the revised pay scale.

The court held:

Ã¢â‚¬Å“53. (Ã¢â‚¬Â¦) The legislature is undoubtedly competent to legislate with retrospective effect to take away or impair any vested right acquired

under existing laws but since the laws are made under a written Constitution, and have to conform to the do's and don'ts of the Constitution

neither prospective nor retrospective laws can be made so as to contravene Fundamental Rights. The law must satisfy the re-quirements of

the Constitution today taking into account the accrued or acquired rights of the parties today. The law cannot say, twenty years ago the

parties had no rights, therefore, the requirements of the Constitution will be satisfied if the law is dated back by twenty years. We are

concerned with today's rights and not yesterday's. A legislature cannot legislate today with reference to a situation that obtained twenty

years ago and ignore the march of events and the constitutional rights accrued in the course of the twenty years. That would be most

arbitrary, unreasonable and a negation of history. It was pointed out by a Constitution Bench of this Court in B.S. Yadav and Ors. etc. v.

State of Haryana and Ors. etc. [1981] 1 SCR 1024, Chandrachud CJ., speaking for the Court,

Since the Governor exercises the legislative power under the proviso to Ar-ticle 309 of the Constitution, it is open to him to give

retrospective operation to the rules made under that provision. But the date from which the rules are made to operate, must be shown to

bear either from the face of the rules or by extrinsic evidence, reasonable nexus with the provisions contained in the rules, especially when

the retrospective effect extends over a long period as in this case"".

Today's equals cannot be made unequal by saying that they were unequal twenty years ago and we will restore that position by making a

law today and making it retrospective. Constitutional rights, constitutional obligations and constitutional consequences cannot be tempered

with that way. A law which if made today would be plainly invalid as offending constitutional provisions in the context of the exist-ing

situation cannot become valid by being made retrospective. Past virtue (con-stitutional) cannot be made to wipe out present vice

(constitutional) by making retrospective laws. We are, therefore, firmly of the view that the Gujarat Panchay-ats (Third Amendment) Act,

1978 is unconstitutional, as it offends Articles 311 and 14 and is arbitrary and unreasonable.Ã¢â‚¬â€‹

40. The impugned provision in the present case reads as follows:

Ã¢â‚¬Å“(11) Notwithstanding anything contained in any judgment, order, or decree of any court or any law for the time being in force, Ã¢â‚¬"Ã¢â‚¬¬

(i) the Chairperson of a Tribunal shall hold office for a term of four years or till he attains the age of seventy years, whichever is earlier;

(ii) the Member of a Tribunal shall hold office for a term of four years or till he attains the age of sixty-seven years, whichever is earlier:

Provided that where a Chairperson or Member is appointed between the 26th day of May, 2017 and the notified date and the term of his

office or the age of retirement specified in the order of appointment issued by the Central Government is greater than that which is specified

in this section, then, notwithstanding anything contained in this section, the term of office or age of retirement or both, as the case may be,

of the Chairperson or Member shall be as specified in his order of appointment subject to a maximum term of office of five years.Ã¢â‚¬â€‹

41. The interim directions of this court, which culminated and were subsumed in Roger Mathew (supra), resulted in the appointment of members of

various tribunals, whose term is now sought to be interdicted by the proviso to Section 184 (11), which has been introduced with retrospective effect. I

agree with Rao, J. that while the retrospectivity accorded to this provision cannot be faulted, nevertheless, the said proviso, to the extent it seeks to

interfere with and curtail the tenure of members appointed under interim orders, who are entitled to enjoy their term of office, in accordance with the

pre-amended legislation and rules, is arbitrary and void. As held in Raman Lal (supra), Ã¢â‚¬Å“(t)oday's equals cannot be made unequal by saying that

they were unequal twenty years ago and we will restore that position by making a law today and making it retrospectiveÃ¢â‚¬¬. In a manner somewhat

reminis-cent of the facts of this case, an interim order, enjoining the employer, All India In-stitute of Medical Sciences (AIIMS) from curtailing the

tenure of the then Director, was sought to be legislatively overridden by Parliament. In P. Venugopal v. Union of India (2008) 5 SCC 1, this court held

that enactment to be unlawful, and held that the curtailment of tenure for one person was arbitrary and based on no reasonable criteria:

Ã¢â‚¬Å“36. From the aforesaid discussion, the principle of law stipulated by this Court is that curtailment of the term of five years can only be

made for justifiable reasons and compliance with principles of natural justice for premature termination of the term of a Director of AIIMS

squarely applied also to the case of the writ petitioner as well and will also apply to any future Director of AIIMS. Thus there was never any

permissibility for any artificial and impermissible classification between the writ petitioner on the one hand and any future Director of

AIIMS on the other when it relates to the premature termination of the term of office of the Director. Such an impermissible

overclassification through a one-man legislation clearly falls foul of Article 14 of the Constitution being an apparent case of Ã¢â‚¬Å“naked

discriminationÃ¢â‚¬ in our democratic civilised society governed by the rule of law and renders the impugned proviso as void ab initio and

unconstitutional.

37. Such being our discussion and conclusion, on the constitutionality of the proviso to Section 11(1-A), we must, therefore, come to this

conclusion without any hesitation in mind, that the instant case is squarely covered by the principles of law laid down by this Court in the

various pronouncements as noted hereinabove including in D.S. Reddi, Vice-Chancellor, Osmania University v. Chancellor [D.S. Reddi,

Vice-Chancellor, Osmania University v. Chancellor, AIR 1967 SC 1305 : (1967) 2 SCR 214] . **********

39. It was further held in D.S. Reddi [D.S. Reddi, Vice-Chancellor, Osmania University v. Chancellor, AIR 1967 SC 1305 : (1967) 2 SCR

214] that such a classification was not founded on an intelligible differentia and was held to be violative of Article 14 of the Constitution of

India. Accordingly, the provision of Section 13-A was held to be ultra vires and unconstitutional and hit by Article 14 of the Constitution.

Similarly in the present case, the impugned proviso to Section 11(1-A) itself states that it is carrying out premature termination of the tenure

of the writ petitioner. It is also admitted that such a premature termination is without following the safeguards of justifiable reasons and

notice. It is thus a case similar to D.S. Reddi [D.S. Reddi, Vice-Chancellor, Osmania University v. Chancellor, AIR 1967 SC 1305 : (1967) 2

SCR 214] and other decisions cited above that the impugned legislation is hit by Article 14 as it creates an unreasonable classification

between the writ petitioner and the future Directors and deprives the writ petitioner of the principles of natural justice without there being

any intelligible differentia.

42. In my opinion, like in P. Venugopal (supra) the curtailment of tenure to five years, of these few individuals appointed as members of tribunals, who

were entitled to continue in office in terms of the pre-existing enactments (upto the age of 62 years etc.) is arbitrary. Apart from the fact that the

Union wishes to curtail their tenure despite the finality of directions of this court in Roger Mathew and MBA-III, there is no conceivable rationale.

Nor has any overriding public interest been espoused as a justification for this. The divesting of judicial office by legislative fiat, in this courtÃ¢â‚¬â„¢s

opinion, directly affects the independence of the judiciary. It also amounts to naked discrimination, because all other members of the same tribunals

would enjoy longer tenure, in terms of the pre-existing conditions of service, which prevailed at the time of their appointment.

43. In MBA III (supra), this Court directed the Union Ã¢â‚¬Ëœto make appointments to tribunals within three months from the date on which the Search-

cum-Selection Committee completes the selection process and makes its recommendations.Ã¢â‚¬â„¢ The necessity to take action on this is emphasized by

the nuts and bolts of the adjudicatory functions of tribunals. As many as 21,259 cases were pending before the National Company Law Tribunal as on

31.12.2020, and 2278 cases were filed before the tribunal under the Insolvency and Bankruptcy Code, 2016 during the period of April to December

2020, out of which only 176 have been disposed so far. [Available at https://economictimes.indiatimes.com/news/economy/policy/over-21250-cases-

pending-before-nclt-at-end-of-december-2020/articleshow/80754041.cms?from=mdr (last accessed on 20.06.2021).] As on April 2021, the NCLT

comprised of its Acting President and a total number of 38 members, out of which 17 are judicial members and 21 are technical members - much

below than the sanctioned strength of 63 members. [Available at https://www.indialegallive.com/top-news-of-the-day/news/plea-in-sc-seeks-

extension-of-tenure-of-nclt-members/ (last accessed on 20.06.2021).] At the Armed Forces Tribunal, against a sanctioned strength of 34, only 11

members are currently in office Ã¢â‚¬" 4 judicial members and 6 administrative members, for the tribunalÃ¢â‚¬â„¢s 11 benches. Till 28.02.2021, a total of

18,829 cases were pending for disposal; the highest pendency was before the principal bench in Delhi, with 5553 cases, followed by Chandigarh with

4512 cases and Jaipur with 3154 cases. [Available at https://www.tribuneindia.com/news/nation/23-out-of-34-posts-of-armed-forces-tribunal-vacant-

19-000-cases-pending-mod-tells-parliament-223283 (last accessed on 20.06.2021).] At the 18 benches of the Central Administrative Tribunal (CAT),

only 36 members are in office, against a sanctioned strength of 65. [Available at http://www.cgatnew.gov.in/writereaddata/Delhi/docs/RTI/list.pdf

(last accessed on 20.06.2021).] Over 48,000 cases are pending disposal at the CAT, with over 28,000 cases pending for 1-5 years. [Available at

https://theprint.in/india/governance/purpose-of-central-administrative-tribunal-far-from-being-achieved-parliamentary-panel/378156/ (last accessed on

20.06.2021).] As on 01.03.2021, 72,452 cases were pending before various benches of the CESTAT. Out of a total strength of 26, 18 positions are

filled, and 8 vacancies are still open in the 9 benches of the CESTAT. [Available at

https://cestatnew.gov.in/uploads/writereaddata/Delhi/docs/pendency022021.pdf (last accessed on 20.06.2021).]At the Income Tax Appellate Tribunal

(ITAT), only 66 members are in office, out of a sanctioned strength of 126 [See https://itat.gov.in/page/content/members (last accessed on

21.06.2021).], and a total of about 88,000 appeals are pending. 24,000 are pending before the Delhi bench, followed by about 16,000 before the

Mumbai bench. [Available at https://www.business-standard.com/article/pti-stories/88-000-appeals-pending-before-income-tax-appellate-tribunal-

chairman-120022601297_1.html (last accessed on 21.06.2021).] At the National Consumer Disputes Redressal Commission (NCDRC), 138105 cases

have been filed since inception (i.e. since 1987) out of which 1,16,572 have been disposed of. 21,443 cases are pending. At state commissions, 124559

cases are still pending, and 401184 are pending before district forums. The total pendency is 547186 cases. [http://ncdrc.nic.in/stats.html (last

accessed on 21.06.2021).] Out of the 44 benches of the Debt Recovery Tribunal (DRT) and sole Debt Recovery Appellate Tribunal (DRAT), 11

benches have vacancies. [https://www.business-standard.com/article/economy-policy/banks-flag-tardy-decision-making-piling-of-cases-at-recovery-

tribunals-119032300883_1.html (last accessed on 21.06.2021).] As of April 2020, the Railway Claims Tribunal had 25,571 pending cases. [See

https://indianexpress.com/article/india/rct-judges-drag-govt-to-sc-cite-fundamental-rights-to-seek-extension-6380655/ (last accessed on 21.06.2021).]

44. The sheer volume of pendency is an indicator of the substantial judicial functions carried out by tribunals, necessitating that they be manned by

efficient, well qualified judicial and technical members. It is necessary that the Union expedite the process of appointments to tribunals, towards

ensuring swifter, and efficacious justice delivery.

45. As a postscript, one would only say that this judgment- seventh in the series commencing with R.Gandhi, hopefully should conclude all

controversies. It would be erroneous on anyoneÃ¢â‚¬â„¢s part to consider that interdiction by this court amounts to conflict with Parliamentary or

executive wisdom. Each judgment- when it interprets provisions relating to setting up of tribunals and other arrangements for tribunals, adds to the

ongoing discourse between the three branches of governance. The Constitution of India envisions a republic, governed by the rule of law, and

guarantees justice: social, economic and political, as well as equality of status and of opportunity. Acting within their assigned spheres, the legislative,

executive and judicial departments strive to further this constitutional vision. When assured rights or the principle of equality cannot be secured by the

citizen or person guaranteed it, she turns to the judicial wing. It is to ensure that this wing has the competence, vitality and fairness, expected of it, that

this court intervenes, to ensure that the adjudicatory mechanisms are robust, independent, and are manned by competent and merited personnel.

46. In view of the foregoing discussion, I conclude and hold as follows:

(i) The first proviso to Section 184(1) of the Finance Act, 2017, introduced by Section 12 of the Tribunals Reforms (Rationalisation and Conditions of

Service) Ordinance, 2021 is hereby declared void and inoperative. Similarly, the second proviso to Section 184(1) of the Finance Act, 2017, introduced

by Section 12 of the Tribunals Reforms (Rationalisation and Conditions of Service) Ordinance, 2021 is held to be void and inoperative.

(ii) Section 184(7) of the Finance Act, 2017 introduced by Section 12 of the Tribunals Reforms (Rationalisation and Conditions of Service) Ordinance,

2021 is hereby declared void and inoperative.

(iii) Section 184(11)(i) and (ii) introduced by Section 12 of the Tribunals (Reforms Rationalisation and Conditions of Service) Ordinance, 2021 are

hereby declared as void and unconstitutional.

(iv) Consequently, the declaration of this Court in para 53(iv) of MBA-III shall prevail and the term of Chairperson of a Tribunal shall be five years or

till she or he attains the age of 70 years, whichever is earlier and the term of Member of a Tribunal shall be five years or till she or he attains the age

of 67 years, whichever is earlier.

(v) The retrospectivity given to the proviso to Section 184(11) Ã¢â‚¬" introduced by Section 12 of the Tribunals (Reforms Rationalisation and Conditions

of Service) Ordinance, 2021 is hereby upheld; however, without in any manner affecting the appointments made to the post of Chairperson or

members of various Tribunals, upto 04.04.2021. In other words, the retrospectivity of the provision shall not in any manner affect the tenures of the

incumbents appointed as a consequence of this CourtÃ¢â‚¬â„¢s various orders during the interregnum period.

(vi) The writ petition is allowed to the above extent.